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TABLE OF CONTENTS.

ARTICLES.

	PAGE
ADMIRALTY, THE EXTENSION OF THE FELLOW SERVANT DOCTRINE TO THE. <i>Frederick Cunningham</i>	294
AUSTRALIA, McCULLOCH <i>v.</i> MARYLAND IN. <i>H. B. Higgins</i>	559
BANKRUPTCY, ANCILLARY RECEIVERSHIPS IN. <i>Lee Max Friedman</i>	519
BANKRUPT PARTNERSHIPS AND PARTNERS, DISTRIBUTION OF ASSETS OF. <i>William J. Shroder</i>	495
BASSE <i>v.</i> BELMONT: AN EARLY DECISION ON INTERCOLONIAL RIGHTS. <i>Chauncey G. Parker</i>	483
BELLIGERENT, THE RIGHT OF A, TO DESTROY A CAPTURED PRIZE. <i>Francis J. Swayze</i>	284
CLOSED MARKET, THE UNION SHOP, AND THE COMMON LAW, THE. <i>William Draper Lewis</i>	444
CONGRESS, THE POWER OF, TO REGULATE RAILWAY RATES. <i>Victor Morawetz</i>	572
CONTRACT, ASSIGNABILITY OF. <i>Frederic C. Woodward</i>	23
CONTRACTS AND BUSINESS IN NEW YORK, INTERFERENCE WITH. <i>E. W. Huffcut</i>	423
CONTRACTS, DISCHARGE OF, BY ALTERATION, I., II. <i>Samuel Williston</i>	105, 165
EQUITABLE CONVERSION, I., II., III. <i>C. C. Langdell</i>	1, 83, 2, 5
FOREIGNERS, JURISDICTION IN ACTIONS BETWEEN. <i>A. Pillet</i>	325
GAGE OF LAND IN MEDIEVAL ENGLAND, THE, II. <i>Harold D. Hazeltine</i>	36
ILLEGAL ACT AS A DEFENSE IN ACTIONS OF TORT, THE PLAINTIFF'S. <i>Harold S. Davis</i>	505
INSURANCE CASES, WAIVER IN. <i>John S. Ewart</i>	364
INTESTACY, THE MEDIEVAL LAW OF. <i>Charles Gross</i>	120
JURISDICTION IN ACTIONS BETWEEN FOREIGNERS. <i>A. Pillet</i>	325
JURISPRUDENCE, THE DEVELOPMENT OF, DURING THE PAST CENTURY. <i>Joseph H. Beale, Jr.</i>	271
MCCULLOCH <i>v.</i> MARYLAND IN AUSTRALIA. <i>H. B. Higgins</i>	559
MOTIVE OF THE ACTOR, HOW FAR AN ACT MAY BE A TORT BECAUSE OF THE WRONGFUL. <i>J. B. Ames</i>	411
MUNICIPALITIES, SPECIAL LEGISLATION FOR. <i>Harry Hubbard</i>	588
PARTNERSHIPS AND PARTNERS, DISTRIBUTION OF ASSETS OF BANKRUPT. <i>William J. Shroder</i>	495
POSSESSION. <i>Albert S. Thayer</i>	196
PRESIDENTIAL SUCCESSION ACT OF 1886, THE. <i>Charles S. Hamlin</i>	182
RAILWAY RATES, THE POWER OF CONGRESS TO REGULATE. <i>Victor Morawetz</i>	572
RECEIVERSHIPS IN BANKRUPTCY, ANCILLARY. <i>Lee Max Friedman</i>	519
RIPARIAN RIGHTS IN THE UNITED STATES, TIDE-FLOWED LANDS AND. <i>William R. Tillinghast</i>	341
TORT BECAUSE OF THE WRONGFUL MOTIVE OF THE ACTOR, HOW FAR AN ACT MAY BE A. <i>J. B. Ames</i>	411
TORT, THE PLAINTIFF'S ILLEGAL ACT AS A DEFENSE IN ACTIONS OF. <i>Harold S. Davis</i>	505
WAIVER IN INSURANCE CASES. <i>John S. Ewart</i>	364

INDEX-DIGEST.

References in heavy-faced type are to **NOTES**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

A

ACCESSION.

See *Damages*.

ACCOMMODATION PAPER.

See *Bills and Notes*.

ACCORD AND SATISFACTION.

Validity: Retention of sum sent as full payment of an unliquidated claim. 617

ACCOUNT.

Equitable remedies upon obligation to account: Bill against fraudulent confuser. 64

ACTIONS.

Particular forms of action, see *Forma Pauperis*.

ADMIRALTY.

Jurisdiction: Tests of jurisdiction over torts. 299

Torts: Extension of fellow-servant rule. 294-297

The "last chance" rule. 537

ADMISSIONS.

By conduct: Payment into court. 460

ADVERSE POSSESSION.

See also *Color of Title*; *Quieting Title*.

Continuity of adverse possession: Grantee of one having title by adverse possession. 62

Who may gain title by adverse possession: Rights resulting from adverse possession of one claiming less than the fee. 380

AGENCY.

See also *Brokers*; *Choses in Action*; *Innkeepers*; *Insurance*.

Nature and incidents of the relation: Knowledge of agent; when imputable to principal. 617

Principal's rights against agent: Principal's right to agent's illegal profits. 309

Principal's liability to third persons in tort: Restriction of choice to licensed class. 225

Stock certificate forged by secretary of company. 144

Independent contractors: Landowner's liability to invited person. 144

Lessee railroad as independent contractor. 152

ALIENS.

See also *Chinese Exclusion Act*.

Exclusion of aliens: whether a judicial question. 390

ALTERATION OF INSTRUMENTS.

See also *Bills and Notes*.

Alteration by holder: effect of authorization by obligor. 115, 116

— Effect of ratification by obligor. 117, 118

Alteration by one of several joint obligors. 118

Alteration of writing before execution. 178-179

Assignment of altered contracts. 173-175

Difference in effect of alteration of contract by holder and by stranger. 113-114

Difference in effect of alteration of deed of conveyance upon corporeal and upon incorporeal hereditaments. 106

Difference in effect upon covenants and conveyances. 105-112

Effect of alteration of mortgage deed. 111

Instances of immaterial alterations. 170-173

Instances of material alterations. 166-170

Pleading and evidence. 179-181

Rule as to discharge of covenants applied also to simple contracts. 112-113

When a debt survives where the writing is destroyed. 175-178

ANIMALS.

See *Railroads*.

APPEAL AND ERROR.

Review: Right to review facts in election contests. 153

APPORTIONMENT.

See *Corporations (Stockholders)*; *Trusts*.

ASSIGNMENTS.

See *Bills and Notes*; *Choses in Action*; *Landlord and Tenant*.

References in heavy-faced type are to **NOTES**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

ASSIGNMENTS FOR CREDITORS.

Marshaling assets: Surrender of securities as condition to proving for whole claim. 144

ATTACHMENT.

See *Transfer of Stock*.

ATTORNEYS.

Relation between attorney and client: Effect of dissolution of law partnership. 69

B

BAIL.

Liability to answer charges not named in bond. 539

BAILMENTS.

Gratuitous bailments: Nature and extent of liability of gratuitous bailee. 539

BANKRUPTCY.

See also *Conflict of Laws*; *Partnership*; *Receivers*.

Petitions in bankruptcy: involuntary proceedings: Computing number of creditors. 62

Petitioner estopped by participation in appointment of receiver. 390

Preferences: The attitude of bankruptcy courts toward preferences. 55

Perfecting an inchoate right as a preference. 606

Rights and duties of bankrupt: Bankrupt a constructive trustee of concealed assets. 63

Provable claims: Tort claim arising from fraud. 309

Part payment for breach of trust by co-trustee. 464

Priority of claims: Right of partnership creditors to share in individual estate. 390

Discharge: Interpretation of statute. 225

Compositions: Effect of Bankruptcy Act of 1898 on compositions. 59

BANKS AND BANKING.

See also *Corporations*.

Deposits: Creation of trust by deposit in savings-bank. 70

Collections: Liability of depository bank. 300

Banker's lien: Requirement of notice. 310

BILLS AND NOTES.

Negotiability: Restriction of the power of assignment. 306

Checks: Death of drawer: effect as between bank and holder. 390

Effect of duplicate check. 464

Defenses: Liability for fraudulent alterations of negligent party. 226

Lack of due presentment. 617

Transfer of accommodation paper after maturity. 615

Doctrine of Price v. Neal: Recovery by drawee paying forged draft. 539

Delivery: Accommodation paper discounted by other than payee. 145

BILLS OF LADING.

Acceptance: failure of shipper to read terms. 465

Bills of lading as security for advances. 307

BONDS.

Bail bond, see *Bail*.

BROKERS.

Broker's right to commission before sale he has negotiated is consummated. 309

BURDEN OF PROOF.

See also *Insane Persons*.

Proof of main issue: Quantum of proof in civil action based on crime. 539

Duty of going forward with evidence in particular cases: Performance of conditions of escrow. 66

Res ipsa loquitur as applied to injuries of servants. 391

C

CANCELLATION OF INSTRUMENTS.

Deeds: effect of cancellation upon title. 107-112

CARRIERS.

See also *Railroads*.

Duty to transport and deliver: Waiver of right to demand bill of lading. 63

Custody and control of goods: When a carrier becomes warehouseman. 145

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

- Connecting lines:** Presumption as to lost goods. 391
- Who are passengers:** *Res ipsa loquitur*. 391
- Tickets:** Statute of limitations as applied to. 396
- Personal injuries to passengers:** Insults by servant. 145
- Duty to accept and carry passengers:** Blindness as ground for rejection. 540
- CHAMPERTY AND MAINTENANCE.**
- General policy of the modern law. 222
- CHARITIES AND TRUSTS FOR CHARITABLE USES.**
- Creation and enforcement of charitable trusts: Control of property on division of church-membership. 310
- CHATTEL MORTGAGES.**
- Recording and registry: Constructive notice. 54, 391
- CHINESE EXCLUSION ACT.**
- Who is Chinese laborer. 399
- CHOSES IN ACTION.**
- See also *Alteration of Instruments*.
- What may be assigned.**
- Contract: right to benefit and control of performance. 24
- Contract of agency: assignment by employer of rights accompanied by delegation of duty. 31-32
- Contracts of independent contractors: assignment of rights accompanied by delegation of duties. 32-33
- Contracts of sale: assignment by buyer of rights accompanied by delegation of duty. 27-31
- Contracts of sale: assignment by seller of rights accompanied by delegation of duty. 24-27
- What contracts may be assigned so as to relieve assignor of liability. 33-35
- Proceeds of future sales. 618
- Manner and effect of assignment:** Effect of statute requiring real party in interest to sue. 63
- COLOR OF TITLE.**
- Title-bonds as color of title. 534
- CONFLICT OF LAWS.**
- See also *Corporations*.
- Recognition of foreign judgments:** Decree of adoption obtained by fraud. 315
- What judgments must be recognized under federal constitution. 544
- Concurrent jurisdiction:** Doctrine of "federal common law." 134
- Jurisdiction for divorce:** Separate domicile of wife. 311
- The requirement of actual notice to non-resident defendants. 215
- Remedies: right of action:** Action barred by foreign statutes of limitation. 220
- Jurisdiction of courts over suits to which all parties are foreigners. 325-340
- Marriage:** Capacity of parties decided by law of place of celebration. 226
- Rights in property:** Validity of foreign chattel mortgages. 145
- Obligations ex delicto:** creation and enforcement: Enforcement of statutory action in foreign jurisdiction. 64
- Insolvency and bankruptcy:** Ancillary receiverships. 519-526
- Whether state law governs admissibility of claim in bankruptcy court. 465
- CONFUSION OF GOODS.**
- Analogy between confusion of goods and of accounts. 64
- CONSTITUTIONAL LAW.**
- See also *Aliens; Conflict of Laws; Emigrant Domain; Extradition; Federal Courts; Interstate Commerce; Judgments; Police Power*.
- Nature and development of constitutional government:** An early decision on intercolonial rights. 483-494
- Construction, operation, and enforcement of constitutions:** Exemption of federal agencies from state control under Australian constitution. 559-571
- Separation of powers:** Exclusion of aliens as a judicial question. 64
- Imposition of penalty by assessor. 540
- Due process of law:** Postponement of trials. 311
- Rights against action by individuals. 391
- Statute authorizing *subpoena* to compel citizen of one state to testify in another. 466
- Imposition of penalty by assessor. 540
- Trial by jury:** Protection afforded by the fourteenth amendment in crimes against the state. 136
- Vested rights:** Public office not property. 146
- Personal rights: civil, political, and religious:** Breach of contract of servant made indictable. 146

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

Restriction of hours of labor on public works.	311, 392
Restriction of hours of labor in bakeries.	618
Privileges and immunities: class legislation: Act allowing private claim against state.	465
Discriminating regulation of street railway rates.	618
Constitutionality of particular acts: The Presidential Succession Act of 1886.	182-195

CONSTRUCTIVE TRUSTS.

Misconduct by non-fiduciaries: Bankrupt a constructive trustee of concealed assets.	63
Title acquired by murderer held subject to constructive trust.	146
Effect of statute of frauds: Absolute conveyance and oral promise to recovery: its effect.	614

CONTEMPT.

Acts and conduct constituting contempt: Libel of a judge after satisfaction of judgment.	392
---	-----

CONTRACTS.

See also <i>Champerty and Maintenance; Choses in Action; Illegal Contracts; Offer and Acceptance; Rescission; Specific Performance.</i>	
Defenses: impossibility: Impossibility by law as excuse for breach of contract.	384
Impossibility caused by voluntary dissolution of partnership.	392
Legal impossibility caused by act of defendant.	64
Defenses: fraud: Validity of fraudulently obtained contract purporting to waive defense of fraud.	466
Discharge of contracts: Discharge by alteration.	105-119, 165-181
Particular classes of contracts: Options: unwarrantable extension of doctrine of equitable conversion to.	10-14
Options: rights and liabilities under option contracts.	457
Remedies for breach: Judgments on instalments already defaulted a bar to recovery for remainder.	619

CONTRIBUTORY NEGLIGENCE.

See also <i>Railroads.</i>	
In general: The "Last Chance" doctrine in admiralty.	537
Imputed negligence: Negligence in the case of a gratuitous passenger.	219
Parent's default a defense in action by child.	311

CORPORATIONS.

See also <i>Agency; Conflict of Laws; Mortgages; Receivers.</i>	
Citizenship of corporation: Federal jurisdiction in eminent domain proceedings.	468
Promoters: Lease to corporation to be formed.	620
Corporate powers and their exercise: Power of corporation to purchase its own shares.	531
Directors and other officers: Director loaning to the corporation.	312
Duties of directors: duty to act in body.	540
Stockholders: rights incident to membership: Right of pre-emption at par.	541
Vesting of stockholder's rights in trustees.	533
Distribution of dividends between life tenant and remainder-man.	621
Enforcement of statutory liability in foreign jurisdictions.	620
Stockholders: individual liability to corporation and creditors: Individual liability as affected by transfer of stock.	455
Nature of liability of stockholders in national bank.	620
Ultra vires: effects of: Exercise of general corporate power for particular <i>ultra vires</i> purpose.	463
General discussion.	461
Foreign corporations: Whether a single transaction may constitute the doing of business.	146
What constitutes doing business.	619
Corporation formed in one state to transact business in another.	226
Law applicable to liability of stockholders for debts of corporation.	452

COSTS.

Security for costs: bond of non-resident.	227
---	-----

COVENANTS RUNNING WITH THE LAND.

See also <i>Restrictions and Restrictive Agreements as to the Use of Property.</i>	
Fencing: right to recover against assignee of covenantor.	214

CRIMINAL LAW.

See also <i>Homicide; International Law.</i>	
Defenses: Justification under prior decision of court.	541
Insanity: Burden of proof.	312
Negligence: Responsibility for failure to use prayer.	621
Acquiescence for detection: En-	

References in heavy-faced type are to **NOTES**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

couragement of crime by public officials.	65	Former jeopardy: Continuous offense.	227
Statutory offenses: Interpretation of statute penalizing sale of oleo-margarine.	467	Right of state to appeal.	216
		Estoppel: Prisoner estopped to deny illegality of his acts.	467

D

DAMAGES.

Exemplary damages: Plaintiff entitled as matter of right.	228
Measure of damages: Right of recoupment for improvements to converted property.	305
Excessive damages: <i>Remittitur</i> by appellate court.	312

DANGEROUS PREMISES.

See also *Landlord and Tenant*.

Liability to trespassers: Liability of third person for condition of premises.	150
Liability to licensees: Firemen as licensees.	397
Liability to invited person: Liability for acts of independent contractor.	144

DEATH BY WRONGFUL ACT.

Statutory liability in general: Expectancy of wife material because of purpose of recovery as shown by disposition of damages.	146
---	-----

DEEDS.

See also *Cancellation of Instruments; Escrows*.

Construction and operation in general: Operation of quitclaim deeds under recording acts.	621
--	-----

DESCENT AND DISTRIBUTION.

The mediæval law of intestacy.

120-131

DISSEISIN.

General nature and effect of disseisin: Purchaser from disseisor has constructive notice of deed to disseisee.	623
Restrictive covenants after disseisin of covenantor.	608

DIVORCE.

See also *Conflict of Laws*.

Alimony: Payment after death of husband.	541
---	-----

DUE PROCESS OF LAW.

See under *Constitutional Law*.

E

EASEMENTS.

See also *Ejectment*.

Modes of acquisition: prescription: Beginning of prescriptive period.	313
Use under mistake as basis for prescriptive right.	314
Extinguishment and revival: Suspension because of misuser.	608

EJECTMENT.

Interference with easement: railroad right of way.	542
--	-----

ELECTION OF REMEDIES.

Set-off in assumpsit on waiver of tort.

398

ELECTIONS.

Apportionment of illegal votes.	228
Effect of improper emblem on validity of ballots.	467

EMINENT DOMAIN.

See also *Federal Courts; Corporations*.

What property may be taken:

Land already occupied for railroad purposes.

313

Condemnation by electric power companies.

528

EQUITABLE CONVERSION.

General discussion of actual as distinguished from equitable conversion.

1-22, 83-104

General historical and analytical discussion.

1-22, 83-104, 245-270

EQUITABLE ELECTION.

Bequest by donee of power to one entitled in default of appointment.

393

Confusion of the doctrine of equitable election with estoppel by deed.

302

EQUITY.

See also *Injunctions; Interpleader; Quietting Title; Receivers; Rescission; Restrictions and Restrictive Agreements as to the Use of Property; Specific Performance*.

Jurisdiction: Prevention of nuisance:

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

whether exercise of jurisdiction discretionary.	149	Post-testamentary declarations of testator.	387
Winding up a benefit society.	147	Statements implying intention to commit suicide as proof of subsequent act.	393
Procedure: Necessary parties to suit.	57	Opinion evidence: Handwriting: testing witness by writings only partially disclosed.	468
ESCROWS.		Character: Character of third persons as evidence of their acts.	459
Deeds: Burden of proof of performance of condition.	66	Documents: Secondary evidence: altered instrument as evidence.	107-109, 180-181
Subsequent sale by grantor before happening of contingency.	138	EXECUTORS AND ADMINISTRATORS.	
ESTOPPEL.		Rights, powers, and duties: In general.	224
Estoppel in pais: Estoppel in criminal law.	467	Liability for default of co-executor.	148
Failure to act.	140, 468, 622	Proceedings by or against: Right of holder of contingent claim to have assets set aside.	66
Nature and rights of an estoppel-asserter.	302	Right to appeal from decision in favor of legatee.	394
EVIDENCE.		Right lost by laches.	542
See also <i>Admissions; Presumptions; Witnesses.</i>		Administration bonds: Surety's liability for debt of insolvent administrator.	394
General principles and rules of exclusion: Court's discretion to exclude cumulative evidence.	381	EXEMPTIONS.	
Confessions: Criminating statements elicited on cross-examination.	65	See <i>Garnishment.</i>	
Declarations against interest: Admissibility after absence for seven years.	471	EXTRADITION.	
Admissibility to contradict record title.	65	Interstate extradition: Defense of statute of limitations.	228
Declarations in the course of duty: Entries made by person other than original observer.	52	International extradition: Application of <i>Gaynor and Greene</i> for <i>habeas corpus.</i>	542
Declarations concerning intention, feelings, or bodily condition: Declarations of present pain necessarily implying past suffering.	148		

F

FEDERAL COURTS.		— rails of street railways.	610
Jurisdiction and powers in general: The United States a party.	314	Right to remove trade fixtures: general discussion.	
Jurisdiction based on diversity of citizenship: Jurisdiction in eminent domain proceedings.	468	FOREIGN CORPORATION.	
Relations of state and federal courts: Effect of decision of state court on the validity of a statute under the state constitution.	134	See under <i>Corporations.</i>	
FENCES.		FORMA PAUPERIS, ACTIONS IN.	
Fencing statutes: liability of railroads under, for damage to trespassing animals.	69	Interpretation of statute permitting.	547
FINDING LOST GOODS.		FORMER JEOPARDY.	
See <i>Title, Ownership, and Possession.</i>		See under <i>Criminal Law.</i>	
FIXTURES.		FRANCHISES.	
Removal: new lease to old tenant.	67	Taxation of franchises.	233
What may be fixtures: electric cars.	394	FRAUDULENT CONVEYANCES.	
		Transfers for value: Covenant in consideration of marriage to convey all after-acquired property.	149
		Rights of creditors: conveyance by husband to wife in performance of contract.	469

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

G

GAME.

Nature of a landowner's right to kill game. 458

GARNISHMENT.

Exemption of wages: estoppel to claim statutory exemption. 543

GIFTS.

Gifts causa mortis: Donee already in possession. 394

H

HIGHWAYS.

Establishment: Use under a mistake as the basis of a prescriptive right. 314

Rights and remedies of abutters: Action by specially assessed proprietor. 229

Injuries from obstructions, etc.: Liability of persons obstructing for injuries to passers-by. 149

Liability of street railway for interference with unlawful obstruction in highway. 303

HISTORY OF LAW.

Constitutional law: An early decision on intercolonial rights. 483-494

Property: Gage of land in mediæval England. 36-50

The mediæval law of intestacy. 120-131

Miscellaneous: Development of jurisprudence during the nineteenth century. 271-283

HOMICIDE.

Suicide: Accessories before the fact. 229

HUSBAND AND WIFE.

See also *Fraudulent Conveyances*; *Divorce*; *Witnesses*.

Rights of husband against wife and in her property: When the property is conveyed to the wife's separate use by the husband. 67

Contracts between husband and wife: Avoidance of statute rendering such contracts unenforceable. 67

Wife's separate estate: Effect of married women's property acts on estate by entirety. 395

Marriage settlements: Covenant to purchase and settle land effecting equitable conversion. 256-265

HYPNOTISM.

See *Witnesses*.

I

ILLEGAL CONTRACTS.

See also *Restraint of Trade*.

Contracts against public policy: Contract to convey all after-acquired property. 622

INDEPENDENT CONTRACTOR.

See *Agency*.

Assignments of rights and duties by, see *Choses in Action*.

INDIANS.

Power of government agent to collect tax levied by Indian tribe. 314

INJUNCTIONS.

Acts restrained: Enforcement of judgment by default entered on false return of service. 395

Acts contributing to infringement of patent. 151

Nuisances. 149

INNKEEPERS.

Duties to travelers and guests: Liability for torts of servant. 67

INSANE PERSONS.

Liability for crimes: Burden of proving insanity in criminal cases. 312

INSURANCE.

Insurance agents: Agent as agent of insured to fill out application. 469

Insurable interest: Reassignment of policy to person without such interest. 396

Marine insurance: Abandonment and subrogation in. 383

Law peculiar to special kinds of insurance — mutual benefit insurance: Right of executor to sue for death benefit fund. 67

Employers' liability insurance:

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

Right of employee against insurer
before satisfaction of judgment. 395

Waiver of condition: Election, not
waiver, the doctrine really involved
in the cases. 364-378

**Construction of particular words
and phrases in standard forms:**
Change in "Interest, title or pos-
session." 543

INTERNATIONAL LAW.

See also *Extradition*; *War*.

Nature and extent of sovereignty:

Crime on high seas: jurisdiction
over same. 304

INTERPLEADER.

Effect of prior decree in favor of one
defendant. 315

INTERSTATE COMMERCE.

**What constitutes interstate com-
merce:** Agreement by beef dealers
in restraint of interstate trade. 469

Control by Congress: Power of Con-
gress to regulate railway rates. 572-587

Control by states: The doctrine of
original packages. 530

J

JOINT DEBTORS.

Effect of alteration of instrument of
obligation with knowledge of one
obligor. 118

JOINT WRONGDOERS.

Judgment as to one and nonsuit as to
other. 229

JUDGMENTS.

See also *Res Judicata*.

What constitutes a judgment: De-
cree of foreclosure. 315

Essentials to validity: Default for
failure to answer. 469

**Setting aside and vacating judg-
ments:** Judgment by default en-
tered on false return of service. 395

Operation as bar to other actions:
Judgment against one joint wrong-
doer and nonsuit as to the other. 229

Foreign judgments: Decree of adop-
tion obtained by fraud. 315

"Full faith and credit" under U. S.
constitution. 544

JURISPRUDENCE.

Development during nineteenth century. 271-283

Jurisdiction in actions between foreign-
ers. 325-340

Justification of criminal act under prior
decision of court. 541

JURY.

See also *Trial*.

Challenge for cause; service on former
trial. 229

Peremptory challenges; number allowed
when several indictments are con-
solidated. 230

L

LANDLORD AND TENANT.

See also *Restrictions and Restrictive
Agreements as to the Use of Property*.

Assignment and sub-letting: Re-
versionary lease to distrain: right
of lessee. 396

Repair and use of premises: Hid-
den dangers in premises: lessor's
duty to warn tenant. 316

**Tenancies from year to year and
month to month:** Holding over
with consent of one of co-owners. 70

LAW SCHOOL.

Advisability of substituting doctor's for
bachelor's degree at Harvard Law
School. 51

Notes on Harvard Law School. 51, 132

LEGACIES AND DEVISES.

See also *Executors and Administrators*.

Lapsed bequests: Application of
statute preventing lapse. 622

**Void or voidable bequests and
devises:** Husband or wife of at-
testing witness as legatee. 474

Legacy upon secret trust for witness. 316

Marshaling: Right of devisee of mort-
gaged estate to claim exoneration
out of pecuniary legacies. 221

LIBEL AND SLANDER.

Privileged communications: The
limits of absolute privilege attaching
to legislative and judicial reports. 142

LIENS.

Banker's lien: requirement of notice. 310

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

LIMITATION OF ACTIONS.

See also *Adverse Possession*.

Nature and construction of statute: Statutory liability: what law governs. 220

Accrual of action: City warrants. 230

District warrants. 544
Operation and effect of bar by limitation: Effect upon right to extradition. 228
 Railway tickets. 396
Ignorance or fraud: Fraudulent concealment of cause of action. 623

M

MALICIOUS PROSECUTION.

Probable cause: Preliminary injunction as evidence of probable cause. 544

MANDAMUS.

Acts subject to mandamus: Refusal of a court to transfer a cause from the law to the equity docket. 397

MARRIAGE.

See under *Conflict of Laws*.

MARSHALING ASSETS AND SECURITIES.

See also *Assignments for Creditors*.

The equity of marshaling: general discussion. 453

MASTER AND SERVANT.

Duty of master to provide safe appliances: Contracts limiting liability. 316

Fellow-servant and vice-principal doctrines: Extension to admiralty. 294-297

Who is vice-principal. 382

MINES AND MINERALS.

Liability for trespass of a person tunneling under another's claim. 68

MISTAKE.

See *Quasi-Contracts; Rescission*.

MORTGAGES.

See also *Alteration of Instruments; Marshaling Assets and Securities*.

Nature and effect of mortgage: Gage of land in mediæval England. 36-50

Equitable mortgages: Right to rents and profits. 544

Rights and liabilities of parties: Compensation. 231

Priorities: Priority of subsequent creditors over a corporate mortgage. 605

Successive assignees of a mortgage debt, each with a legal res. 135

Transfer of rights and property: The land as debtor and the mortgagor as surety. 545

Right of devisee of mortgaged estate to claim exoneration out of pecuniary legacies. 221

Merger of interests: Discharge of the obligation. 150

Foreclosure: Effect of usury on rights of purchaser of equity of redemption. 68

MUNICIPAL CORPORATIONS.

Municipal property: Exemption from state taxation. 385

Liability for torts: Condition of streets. 470

Actions by and against municipal corporations: Accrual of action on city warrants. 230

Legislative control: Folly of prohibiting special legislation. 588-604

N

NATIONAL BANKS.

See *Corporations*.

NEGLIGENCE.

See also *Criminal Law*.

Imputed negligence, see under Contributory Negligence.

Duty of care: Degrees of negligence. 536

Liability of third party for injuries to trespasser. 150

Prevention of escape of unhealthful air. 68

Defenses: Illegality of plaintiff's act as a defense. 505-518

NEW TRIAL.

Grounds for granting new trial: Improper conduct of counsel. 317

NOTICE.

Constructive notice by possession. 218

Constructive notice: purchaser from disseisor has notice of deed to disseisee. 623

NUISANCE.

Accrual of action: Negligence as the basis of the plaintiff's right when his injury is not to his property but to his person. 68

Equitable relief: Whether discretionary or of right. 149

References in heavy-faced type are to **NOTES**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

O

OFFER AND ACCEPTANCE.

Bilateral contracts: Implied acceptance of terms of bill of lading. 465

Revocation of offer: Communication of revocation. 139

Necessity of communication; theory of *Dickinson v. Dodds*. 139

P

PARTIES.

Necessary parties in general. 57

PARTNERSHIP.

Rights and remedies of creditors:

Distribution of assets of bankrupt partnership and partners. 495-504

Right of partnership creditors to share in individual estate. 390

Dissolution and winding-up: Effect upon contracts. 392

Termination of contracts between attorney and client. 69

PAROL EVIDENCE RULE.

Construction of documents: Rule applied to third parties. 231

PATENTS.

Infringement: injunction against acts contributing to infringement. 151

Desirability of a single court of patent appeals. 217

PHYSICIANS AND SURGEONS.

Necessity of patient's consent to operation. 624

PLEADING.

Appropriate pleading in case of alteration of instrument. 179-181

Defense of purchase for value. 470

PLEDGES.

Wrongful sale or repledge by a pledgee. 610

POLICE POWER.

Regulation of business and occupations: Charges of employment agencies. 151

Horseshoers required to pass examination. 471

POWERS.

Execution of power: effect of appointment in accordance with bargain. 545

PRESCRIPTION.

See *Easements*.

PRESUMPTIONS.

Nature and scope: Relation of presumptions to evidence. 546, 624

Existence and effect of presumptions in particular cases:

Death after seven years: declarations against interest. 471

Questions of marketable title: presumption that a woman of advanced years is incapable of childbearing. 545

Loss of goods by connecting carrier. 391

PRIVACY, RIGHT OF.

Infringement of the right: Unauthorized use of portrait for advertising purposes. 625

PURCHASERS FOR VALUE WITHOUT NOTICE.

See *Pleading*.

Q

QUASI-CONTRACTS.

Waiver of tort: Set-off in assumpsit on waiver of tort. 398

Rights arising from mistake of fact: recovery of over-payment by trustee. 546

QUIETING TITLE.

Bill to remove vendor's lien when claim for purchase price is barred by limitations. 471

Removal in favor of adverse possessor of cloud on title. 147

What constitutes a cloud on title. 527

R

RAILROADS.

Liability to employees: Lessor's liability to lessee's employees. 152

Liability to trespassers: Contributory negligence. 231

Trespasser on train injured by collision. 397

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

Liability for damage to animals:
Animals trespassing on adjacent property: under fencing statutes. 69

RECEIVERS.

Interference with receivers by foreclosure lien obtained on tax sale. 232
Pendency of numerous actions against corporation as ground for appointment. 398
Ancillary receiverships in bankruptcy. 519-526

RECORDING AND REGISTRY LAWS.

See also *Conflict of Laws*; *Deeds*.
Effect of recording in general.
Admissibility of declarations against interest to contradict record title. 65

Title not affected by cancellation of indorsement. 110

Notice by record: Constructive notice to one claiming no interest in the property. 54

Limitations of the doctrine of constructive notice by possession. 218

RESCISSION.

Rescission upon other party's breach, repudiation, etc.:
Breach without repudiation as cause for rescission. 61
Rescission for mistake: Unilateral mistake. 624

RES IPSA LOQUITUR.

See *Burden of Proof*.

RES JUDICATA.

What judgments are conclusive:
Effect of judgment by dismissal. 60

Matters concluded: Applied to matters of law. 389

RESTRAINT OF TRADE.

See also *Torts*.

Combinations by agreements as to products or prices: Beef dealers combining to control market: "Beef Trust" case. 469

Contracts to employ only union men: Validity. 471

State anti-trust legislation: Construction of. 624

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY.

Change in character of locality as ground for refusing injunction where duration of covenant is limited. 472

Enforcement of restrictions: suit by intermediate lessor. 151

Enforcement of restrictions: who may enforce. 535

Implied right of covenantor to similar covenants from his purchaser. 152

Restrictive covenants after the disseisin of the covenantor. 608

RULE AGAINST PERPETUITIES.

Interests subject to rule: options to purchase fee. 379

Remote bequest by donee of power to one entitled in default of appointment: equitable election. 393

Time of vesting and not the duration of the estate the test. 232

Rule against possibility on possibility. 623

S

SALES.

Assignment of rights and duties under contract of sale, see *Choses in Action*.

Conditional sales: Forfeiture of instalments. 611

Rights and remedies of seller: Specific performance at law. 298

Rights and remedies of buyers: Duty to furnish cars. 233

Right of inspection in sales C. O. D. 386

Title of goods subject to bill of lading: Bills of lading as security for advances. 307

Warranties; remedies for breach: Remedy for breach of warranty of title. 152

SCHOOLS AND SCHOOL DISTRICTS.

Discriminating regulation of street railway rates in favor of school children. 618

SET-OFF AND COUNTERCLAIM.

Claim in *assumpsit* on waiver of tort. 398

SPECIFIC PERFORMANCE.

See also *Statute of Frauds*.

General nature and scope of equitable relief: Adequacy of legal remedy in contracts for sale of land. 625

Insolvency. 454

Affirmative contracts: Options. 457

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

STATES.

See *Constitutional Law (Class Legislation)*.

STATUTE OF FRAUDS.

See also *Constructive Trusts*.

Part performance: Part performance without a change of possession. 137

Interest in lands: Whether consent of cestui to transfer by trustee must be in writing. 53

Sufficient memorandum: Undelivered deed as memorandum. 626

STATUTES.

Amendments: Effect on act previously amended. 233

Interpretation: Statute permitting action in *forma pauperis*. 547

SUBROGATION.

Rights of insurer, see *Insurance*.

SURETYSHIP.

Surety's defenses: absence, extinction, or suspension of principal obligation: Right to control application of payments. 399

— **variation of risk:** Effect of plaintiff's breach of contract to insure. 626

— **miscellaneous defenses:** Non-liability for debt of administrator insolvent when appointed. 394

T**TAXATION.**

Particular forms of taxation: Franchise tax on insurance companies applies only to premiums paid under subsequent contracts. 233

Exemptions: municipal property. 385

Collection and enforcement: Assumption of invalid taxes. 472

TELEGRAPH AND TELEPHONE COMPANIES.

Liability to addressee: Liability for delay or non-delivery. 234

TENANCY IN COMMON.

Leases—Liability of firm of one tenant in common for holding over. 70

Possession of one tenant in common as constructive notice.

TENDER.

Payment into court: effect as admission. 460

TITLE, OWNERSHIP, AND POSSESSION.

Finding lost goods: landowner's rights to chattels there found. 317

Nature and essential elements of possession. 196-213

Rights incident to ownership of land: right to kill game. 458

Things subject to ownership as property: oysters. 472

TORTS.

See also *Admiralty; Agency; Bankruptcy; Dangerous Premises; Highways; Joint Wrongoers; Municipal Corporations; Nuisance; Railroads*.

General nature of tort-liability: Malice, nature and effect of. 411-422

Liability of maker or vendor of a chattel to third person injured

by its use: Nature and grounds of liability in general. 318

Existence of tort liability in various unusual cases: Liability of proprietor of public resort for insult to guests. 153

Interference with business or occupation: The closed market and the union shop. 444-451

General discussion of law in New York. 423-443

Defenses: Illegal act of plaintiff. 505-518

TRADE MARKS AND TRADE NAMES.

Marks and names subject to ownership: Personal names. 318

Geographical names. 234

Rights of a person to trade in his own name. 56

TRADE UNIONS.

See also *Torts*.

Contracts to employ only union men: Validity of. 471

TRANSFER OF STOCK.

Attachment by creditor of transferrer: rights when transfer not recorded, where creditor has actual notice. 473

Individual liability of stockholders as affected by. 455

TRIAL.

Verdicts: Unanimity of jury upon grounds of verdict. 547

TROVER AND CONVERSION.

Damages: Right of recoupment for improvements to converted property. 305

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are indicated in the annual periodical index which follows this index.

TRUSTS.

See also *Bankruptcy; Banks and Banking; Constructive Trusts.*

Creation and validity: Definiteness of cestui: whether necessary. 529

Voluntary creation of trust by deposit in savings-bank. 70, 626

Cestui's interest in the res: Apportionment of loss between tenant for life and remainderman. 318

Following trust property: Conveyance by trustee with consent of

cestui: application of statute of frauds. 53

Powers and obligations of trustees: Liability for interest. 70

Rights and liabilities of third parties: Successive assignments of mortgage debt. 135

Resulting trusts: Effect of grant for illegal purpose. 547

Effect of indeterminate contribution to purchase price. 473

U

UNFAIR COMPETITION.

See *Restraint of Trade; Torts; Trade Marks and Trade Names.*

UNITED STATES.

United States a party in federal court.

314

USES.

Personalty under Statute of Uses. 234

USURY.

See *Mortgages.*

V

VENDOR AND PURCHASER.

See *Restrictions and Restrictive Agreements as to Use of Property; Quiet-ing Title.*

VERDICT.

See under *Trial.*

VOLUNTARY ASSOCIATIONS.

Equitable jurisdiction to dissolve. 147

W

WAIVER OF TORT.

See *Election of Remedies.*

WAR.

Right to destroy a captured prize.

284-293

WARRANTY.

See *Sales.*

WATERS AND WATER-COURSES.

Natural watercourses: riparian rights: Riparian rights of railway company to abstract water for supplying locomotives. 71

Right to natural flow. 234

Subterranean and percolating waters: Percolating waters: landowner's right of appropriation. 71

Tidal waters: Tide-flowed lands and riparian rights in the United States. 341-363

Surface waters: Right to drain surface water from adjoining land. 626

WILLS.

See also *Evidence; Legacies and Devises.*

Execution: Attesting witnesses: husband or wife of legatee as witness. 474

Signature of testator at end of will. 627

Construction: Provision against contest. 153

Implied devise. 548

Nuncupative wills: meaning of phrase "last sickness." 548

WITNESSES.

See *Wills.*

Competency in general: Competency of promisee to testify in suit by beneficiary son. 548

Competency of one spouse to testify against the other. 613

Privilege against self-incrimination: Production of documents. 234

Privileged communications: Physician: waiver of privilege. 399

Impeachment: Previous hypnotism of witness. 627

BOOK REVIEWS.

	PAGE
Alderson: A Practical Treatise on the Law of Receivers	631
Amos and Arminjon: A Collection of Problems and Exercises in the Civil and Commercial Law of Egypt	324
Baldwin: American Railroad Law	79
Bate: Notes on the Doctrine of Renvoi in Private International Law	158
Bateson: Borough Customs (Publications of the Selden Society)	407
Beale: The Law of Foreign Corporations	480
Bodington: An Outline of the French Law of Evidence	242
Clark: A Treatise on Street Railway Accident Law. Second edition	78
Clephane: The Organization and Management of Business Corporations	556
Copyright Cases. Compiled by Arthur S. Hamlin	162
Current Law. Edited by George Foster Longsdorf and Walter A. Shumaker	322
Cyclopedia of Law and Procedure. Edited by William Mack, Vols. XI. and XII.	79, 80
Dictionary of Legal Quotations. Edited by James William Norton-Kyshe	557
Dunlap: Abridgment of Elementary Law	632
Edgington: The Monroe Doctrine	404
Fairlie: The National Administration of the United States of America	634
Farnham: The Law of Waters and Water Rights	77
Flanders: An Exposition of the Constitution of the United States. Fifth edition	81
Frost: A Treatise on the Incorporation and Organization of Corporations	482
Gaius: Institutes of Roman Law with a Translation and Commentary by the Late Edward Poste. Fourth edition by E. A. Whittuck	633
Goddard: Outlines of the Law of Bailment and Carriers	405
Goddard: Selected Cases on the Law of Bailment and Carriers	405
Gould: The National Bank Act	243
Gould and Blakemore: The Bankruptcy Act of 1898	80
Hughes: Handbook of Jurisdiction and Procedure in United States Courts	481
Ingalls: An Outline of Municipal Government in the City of New York	409
Ingersoll: Handbook of the Law of Public Corporations	323
Joyce: A Treatise on Damages	406
Lewis: Cases on Restraint of Infringement of Incorporeal Rights	242
McClain: Constitutional Law in the United States	555
Maitland: Year Books of Edward II. Vol. II. (Publications of the Selden Society)	553
Majumdar: The Hindu Wills Act, with Notes and Commentaries	634
Nellis: Street Railroad Accident Law.	78
Patterson: The United States and the States under the Constitution. Second edition. Edited by Robert P. Reeder	323
Pillet: Principes de Droit International Privé	554
Pollock: The Expansion of the Common Law	163
Pollock: The Law of Torts. Seventh edition ¹	161
Pomeroy: Code Remedies. Fourth edition. Revised and Enlarged by Thomas A. Bogle	160
Probate Reports Annotated. Edited by Geo. A. Clement.	243
Radcliffe and Miles: Cases Illustrating the Principles of the Law of Torts	159
Robbins: A Treatise on American Advocacy	241
Rood: A Treatise on the Law of Wills	409
Rowe: The United States and Porto-Rico	162

	PAGE
Selected Statutes, Cases, and Documents to Illustrate English Constitutional History. Edited by C. Grant Robertson	556
Snyder: The Interstate Commerce Act	241
Street Railway Reports. Vol. II. Edited by Frank B. Gilbert	557
Tompkins: A Summary of the Law of Private Corporations	163
Vance: Handbook of the Law of Insurance	239
Wiener: Studies in Biblical Law	408
Wigmore: A Treatise on the System of Evidence in Trials at Common Law	478
Willard: Notes to the Spanish Civil Code	161
Willoughby: The American Constitutional System	635
Young: Political and Constitutional Study of the Cumberland Road	240

TABLE OF CASES.

References in heavy-faced type are to NOTES; all others are to RECENT CASES. Citations to decisions which were noticed before their appearance in any regular report have been supplied wherever possible.

	PAGE		PAGE
Adams Express Co., Burr <i>v.</i>	145	Board, etc., of Indianapolis <i>v.</i>	624
Ainsworth, De Arnaud <i>v.</i>	142 , 150	Bender	624
Alabama, etc., R. R. Co. <i>v.</i>	312	Boots, etc., Co. Ltd., Harris <i>v.</i>	151
Roberts	615, 618	Boston Elevated R. Co., Bates <i>v.</i>	453, 470
Alderman, Mersick <i>v.</i>	227	Bovine (Limited) <i>v.</i> Dent & Wil-	392
Aldrich <i>v.</i> British, etc., Co.	60, 69	kinson	469
Allen, Lindsay <i>v.</i>	384, 392, 465	Bowen, Lavender <i>v.</i>	146
American Trading Co., Northern	57, 65	Box <i>v.</i> Lanier	547
Pacific Railway Co. <i>v.</i>	610, 624	Bradford <i>v.</i> Southern Ry. Co.	217, 231
American, etc., Co., Wilson <i>v.</i>	313	Breitweiser, Eldred <i>v.</i>	227
Ames <i>v.</i> Sutherland	626	British, etc., Co., Aldrich <i>v.</i>	392
Ann Arbor, etc., Co. <i>v.</i> Ann Arbor,	623	Broad <i>v.</i> Woydt	392
etc., R. R. Co.	318	Broad Exchange Co., McCul-	608, 622
Applegate <i>v.</i> Franklin	471	loch <i>v.</i>	542
Ashforth's Trusts, <i>In re</i>	540	Brock, Graham <i>v.</i>	542
Atkinson, <i>In re</i>	622	Brooklyn Heights R. R. Co.,	145
Aubrey, <i>In re</i>	548	Gillespie <i>v.</i>	228
Audenried <i>v.</i> East Coast Co.	548	Bruce, <i>In re</i>	394
Baillarge <i>v.</i> Clark	548	Buckel <i>v.</i> Smith's Administrator	145
Baird <i>v.</i> Baird	396	Bull <i>v.</i> Latimer & Helm	627
Baker, Lewis <i>v.</i>	622	Bull, <i>In the Will of</i>	392
Baltimore, etc., Homes <i>v.</i> Pierce	310	Burdett <i>v.</i> Commonwealth	380, 390
Bank of Anderson, Callahan <i>v.</i>	231	Burditzke, Maas <i>v.</i>	309
Barnard <i>v.</i> Paterson	230	Burke, Crawford <i>v.</i>	531, 541
Barnes <i>v.</i> Turner	617	Burnes <i>v.</i> Burnes	542
Barnsdall <i>v.</i> O'Day	152	Burns, Kansas, etc., Ry. Co. <i>v.</i>	145
Barnum <i>v.</i> Cochrane	544	Burr <i>v.</i> Adams Express Co.	544
Barrington, Grimm <i>v.</i>	137 , 152	Burt <i>v.</i> Smith	314
Barrow, Dickinson <i>v.</i>	453, 470	Buster & Jones <i>v.</i> Wright	310
Bates <i>v.</i> Boston Elevated R. Co.	534, 543	Callahan <i>v.</i> Bank of Anderson	470
Beasley <i>v.</i> Equitable Securities	228	Casey, Mantle <i>v.</i>	148
Co.	541	Cashin <i>v.</i> N. Y., etc., R. R. Co.	389, 398
Beaudrot <i>v.</i> Southern Ry. Co.	624	Cass County, Chicago, B. & Q.	471
Bell, State <i>v.</i>	622	R. R. <i>v.</i>	396
Bender, Board, etc., of Indian-	230	Cassiano <i>v.</i> Galveston, etc., Ry.	226
apolis <i>v.</i>	466	Co.	626
Betjeman, Pimel <i>v.</i>	67	Chace, <i>Ex parte</i>	467
Betts <i>v.</i> United States	391	Charlton <i>v.</i> Columbia Real Estate	389, 398
Biggers, Equitable Mfg. Co. <i>v.</i>	235	Co.	467
Bingham <i>v.</i> Weller		Chaves, Esquibel <i>v.</i>	467
Birdwell, St. Louis, etc., Ry.		Chicago, B. & Q. R. R. <i>v.</i> Cass	
Co. <i>v.</i>		County	
Blanchard Co., Pray <i>v.</i>			

	PAGE		PAGE
Chicago, etc., Electric R. R. Co.		Davenport v. Davenport . . .	215, 226
v. Chicago, etc., Ry. Co. . .	313	David Payne & Co., <i>In re</i> . . .	463, 467
Chicago, etc., Ry. Co. v. Hart . .	152	Davis v. Kuck	395
v. McEwen	214, 227	v. Mills	220, 231
v. O'Brien	391	Pratt v.	624
Choisser v. York	228	v. Seaboard, etc., Ry. . .	311
Churchyard, United States v. . .	314	v. Tacoma, etc., Co. . .	153
Cincinnati, etc., R. R. Co., Shad-		De Arnaud v. Ainsworth . . .	142, 150
doan's Administrator v. . . .	397	Deckey, <i>Ex parte</i>	151
City of Frankfort v. Common-		Dent & Wilkinson, Bovine (Lim-	
wealth	385, 399	ited) v.	392
City of New York v. Cody . . .	315	Derlach Bank, Drumm-Flato	
Coolidge v.	470	Com. Co. v.	52, 66
City of Omaha, Eddy v.	472	Detroit, etc., Ry. Co., Hampel v.	
City of Toronto, Ry. Co. v. . .	394	Thick v.	219, 227
Clark, Baillarge v.	622	386, 398
Clark, State v.	312	Dewey, McDonald v.	455, 467
Clark, Hood & Co., Clifton v. .	69	Deyo v. Kingston, etc., R. R. Co.	144
Clegg v. Southern Ry. Co. . . .	63	Dickinson v. Barrow	137, 152
Cleveland, etc., R. Co. v. People	540	Doerr, Kurz v.	539
Clifton v. Clark, Hood & Co. .	69	Dominion Bank, Ewing v. . .	140, 148
Woodall v.	379, 398	Dowling & Allgood v. Wood .	543
Clithero v. Fenner	62	Drumm-Flato Com. Co. v. Derlach	
Coal Creek Coal Co., Slover v. .	398	Bank	52, 66
Cochrane, Barnum v.	152	Drury, Moors v.	307, 310
Cody, City of New York v. . . .	315	Duncan, Union & Planters' Bank	
Colbert's Estate, <i>In re</i>	387, 393	of Memphis v.	144
Collum v. Sanger Bros.	218, 232	Dunlop, etc., Co. v. Moseley &	
Colonial Bank of Australia, Mar-		Sons	151
shall v.	226	Dunnebecke, Village of Melrose	
Columbia Real Estate Co., Charl-		Park v.	233
ton v.	626	Earl v. Lubbock	318
Commercial National Bank,		East Coast Milling Co., Auden-	
Lewis v.	464	ried v.	540
v. Nacogdoches, etc., Co. . .	468	East, Houston, etc., R. R. Co. v.	71
Commonwealth, Burditt v. . . .	392	Easterly, Hetzel v.	150
City of Frank-		Eckes v. Stetler	397
fort v.	385, 399	Eddy v. City of Omaha . . .	472
v. Hicks	229	Edwards, Herrick v.	306, 310
v. Interstate, etc.,		v. Hood-Barrs	464
Ry. Co.	618	Eldred v. Breitweiser	217, 231
Commonwealth, etc., Co. v. Weber,		Elgin, etc., Co. v. Loveland . .	234
etc., Co.	539	Ellington, Mial v.	146
Commonwealth of Pennsylvania,		Ely, Lewis v.	535, 546
<i>In re</i>	466	Emery v. Philadelphia	147
Companies' Acts, <i>Re</i>	64	Emmons v. Harding	138, 147
Condon, O'Brien v.	316	Empire Life Insurance Co.,	
Continental Trust Co., Stokes v.	541	Reilly v.	469
Cook v. County of Marshall . . .	544, 530	Equitable Mfg. Co. v. Biggers .	466
Coolidge v. City of New York .	470	Equitable Securities Co.,	
Corcoran, <i>In re</i>	390	Beasley v.	534, 543
County of Marshall, Cook v. . .	344, 530	Erie R. R. Co., Powell v. . . .	231
Cowdry's Will, <i>In re</i>	624	Thompson v.	231
Crane Co. v. Pacific, etc., Co. .	399	Esquibel v. Chaves	467
Crawford v. Burke	309	Evan Jones & Co., Powell &	
Daltry v. Media	150	Thomas v.	309
Dana, Smith v.	621	Evans, United States v. . . .	299, 309

	PAGE		PAGE
Ewing v. Dominion Bank	140, 148	Great Southern, etc., Co. v. Jones	134, 149
Exum, State v.	627	Greer v. Newland	54, 63, 391
Fairbanks, Thompson v.	606, 617	Gregg v. Metropolitan Co.	605, 623
Fargo, Johnson v.	316	Grimm v. Barrington	544
Farmers, etc., Ass'n, Lewis v.	68	Groff v. Groff	468
Fenner, Clithero v.	62	Grout, People <i>ex rel.</i> Cossey v.	311
Ferguson v. Ray	317	Hampel v. Detroit, etc., Ry. Co.	219, 227
Fidler, Snyder v.	309	Harding, Emmons v.	138, 147
Finck v. Tranter	544	Harris v. Boots, etc., Co. Ltd.	151
Finley v. United States Casualty Co.	395	Hart, Chicago, etc., Ry. Co. v.	152
Fireman's, etc., Co. v. Oregon, etc., Co.	63	Hazelton v. Miller	625
Fischer v. Union Trust Co.	545	Healy, Valentine v.	70
Fong Yim, In the Matter of	390	Helmka, O'Neil v.	618
Ft. Worth, etc., Ry. Co. v. Glenn	68	Hempstock v. Lackawanna, etc., Co.	397
Fowler v. Will	621	Hendry v. Whidden	454, 472
Frank v. Stratford-Handcock	139, 150	Herrick v. Edwards	306, 310
Swartz v.	55, 62	Hetzel v. Easterly	150
Franklin, Applegate v.	626	Heyman v. Thomas	398
Frazier v. Western Union Telegraph Company	234	Hicks, Commonwealth v.	229
Friends Estate, <i>In re</i>	153	Higby v. Pennsylvania R. R. Co.	229
Fuller v. Jameson	543	Hinman, Wilson v.	541
Fulton v. Wilmington, etc., Co. (133 Fed. Rep. 193)	225	Hobbs, Rockingham, etc., Co. v.	528, 542
Furness, Risdon Iron and Locomotive Works v.	452, 465	Hogan, Smits v.	222, 226
Gage v. Springer	229	Hohn v. Shideler	626
Galveston, etc., Ry. Co., Cassiano v.	396	Holden v. Missouri Rd. Co.	547
Gamble v. Rural Independent School District	302, 314	Holder v. Western, etc., Bank	300, 310
Garibaldi and Cuneo v. O'Connor	149	Hollingshead, Pakas v.	619
Gay, Lanning v.	474	Hood Barrs, Edwards v.	464
Gaynor, United States v.	543	Horne, <i>In re</i>	556
General Assembly of the Free Church of Scotland v. Lord Overtoun	310	Horton v. Gill	397
German-American Bank v. Mills	617	Haupt, Scott v.	473
Germania, etc., Co., Ross-Lewin v.	393	Houston, etc., R. R. Co. v. East	71
Gill, Horton v.	397	Howard v. Union Ry. Co.	303, 314
Gillespie v. Brooklyn Heights R. R. Co.	145	Hunt's Will, <i>In re</i>	399
Glenn, Ft. Worth, etc., Ry. Co. v. Glenn's Adm'r, Southern Ry. Co. v.	68	Illinois Central R. Co. v. Smith	540
Gordon v. Ware National Bank	396	Industrial & General Trust v. Tod	533, 541
Gould v. United States, etc., Ass.	68	International Paper Co., Trustees of Dartmouth College v.	305, 313
Graham v. Brock	542	Interstate, etc., Ry. Co., Commonwealth v.	618
v. Whitridge	232, 234	Iowa Central Ry. Co., Rand v.	63
Gray, James v.	465	Iverson v. McDonnell	317
Great Fingall Consolidated, Deyo v.	144	Jack, State v.	312
		James v. Gray	465
		v. James	315
		Jameson, Fuller v.	543
		Jamison v. Wimbish	136, 146
		John Deere Plow Co. v. Wyland	146
		Johnson v. Fargo	316
		<i>In re</i>	148

	PAGE		PAGE
Johnson <i>v.</i> Southern, etc., Association	232	Maas <i>v.</i> Burditzke	380, 390
Jones, Great Southern, etc., Co. <i>v.</i>	134, 149	Madisonville Traction Co. <i>v.</i>	468
Thistle <i>v.</i>	620	Saint Bernard Mining Co.	468
Jones and Laughlin Steel Co., Sullivan <i>v.</i>	149	Mallory, State <i>v.</i>	458, 469
Judd, Smoot <i>v.</i>	395	Mantle <i>v.</i> Casey	470
Kansas, etc., Ry. Co. <i>v.</i> Burns	542	Marshall <i>v.</i> Colonial Bank of Australia	226
Rinehart <i>v.</i>	69	Marshall Oil Co., Stone <i>v.</i>	64
Kennedy, Leighton <i>v.</i>	62	Matthews <i>v.</i> Thompson	53, 70
Kepner <i>v.</i> United States	216, 228	McCartney <i>v.</i> Londonderry, etc., Ry. Co.	71
Killen <i>v.</i> Nebraska	315	McClaine <i>v.</i> Rankin	620
Kingston, etc., R. R. Co., Deyo <i>v.</i>	144	McClure <i>v.</i> Leaycraft	472
Kinhead <i>v.</i> Lynch	298, 317	McCulloch <i>v.</i> Broad Exchange Co.	608, 622
Kittle, Rease <i>v.</i>	457, 466	McCurdy, Rady <i>v.</i>	67
Koefoed <i>v.</i> Thompson	614, 619	McDonald <i>v.</i> Dewey	455, 467
Kuck, Davis <i>v.</i>	395	McDonnell, Iverson <i>v.</i>	317
Kurz <i>v.</i> Doerr	539	McEwen, Chicago, etc., Ry. Co. <i>v.</i>	214, 227
Lackawanna, etc., Co., Hempstock <i>v.</i>	382, 397	McMahan, Shields <i>v.</i>	153
Lafayette & Bro. <i>v.</i> Merchants' Bank of Fort Smith	539	McMillan, Swain <i>v.</i>	66
Laird <i>v.</i> Vila	67	Medea, Daltry <i>v.</i>	150
Lanier, Box <i>v.</i>	146	Merchants' Bank of Fort Smith, Lafayette & Bro. <i>v.</i>	539
Lanning <i>v.</i> Gay	474	Merrick, Syracuse Savings Bank <i>v.</i>	135, 150
Laroe <i>v.</i> Sugar Loaf Dairy Co.	617	Mersick <i>v.</i> Alderman	615, 618
Latimer & Helm, Bull <i>v.</i>	145	Metropolitan Co., Gregg <i>v.</i>	605, 623
Lattan, Totten <i>v.</i> (179 N. Y. 112)	70	Mexican, etc., R. R. Co., Slotter <i>v.</i>	64
Laughlin, Philip <i>v.</i>	66	Meyer, Pennsylvania Ins. Co. <i>v.</i>	619
Lavender <i>v.</i> Bowen	469	Mial <i>v.</i> Ellington	146
Lead Company's, etc., Society, <i>In re</i>	147	Middletown Nat. Bk. <i>v.</i> Toledo, etc., Ry. Co.	620
Leaycraft, McClure <i>v.</i>	472	Milbrath, Pietsch <i>v.</i>	623
Lehndorff, Rahmel <i>v.</i>	67	Miller, Hazelton <i>v.</i>	625
Leighton <i>v.</i> Kennedy	62	Nagle <i>v.</i>	234
Lewis <i>v.</i> Baker	396	People <i>ex rel.</i> The Provident, etc., Society <i>v.</i>	233
Commercial National Bank	464	<i>v.</i> Robertson	147
<i>v.</i> Ely	535, 546	Mills, Davis <i>v.</i>	220, 231
<i>v.</i> Farmers, etc. Ass'n	68	German-American Bank <i>v.</i>	617
Lindsay <i>v.</i> Allen	60, 69	People <i>v.</i>	65
Livingstone, The	383, 396	<i>v.</i> United States, etc., Co.	471
Lockner <i>v.</i> State of New York	618	Missouri Edison Co., Wells <i>v.</i>	460, 464
Londonderry, etc., Ry. Co., McCartney <i>v.</i>	71	Missouri Rd. Co., Holden <i>v.</i>	547
Lorain Steel Co. <i>v.</i> Norfolk, etc. Ry. Co.	610, 622	Mol, People <i>v.</i>	230
Lord Overtoun, General Assembly of the Free Church of Scotland <i>v.</i>	310	Monahan <i>v.</i> Monahan	547
Loveland, Elgin, etc., Co. <i>v.</i>	234	Montana Mining Co. <i>v.</i> St. Louis etc., Co.	68
Lowenstein <i>v.</i> Henry McShane Mfg. Co., 130 Fed. Rep. 1007	390	Moors <i>v.</i> Drury	307, 310
Lowry, Cassell <i>v.</i>	471	Morgan & Co. <i>v.</i> Palmer	527, 546
Lubbock, Earl <i>v.</i>	318	Moroney <i>v.</i> Roughan	61, 65
Lynch, Kinhead <i>v.</i>	298, 317	Morrill <i>v.</i> Morrill	395
		Moseley & Sons, Dunlop, etc., Co. <i>v.</i>	151
		Mount <i>v.</i> Tuttle	529, 548
		Murphy's Estate, <i>In re</i>	394

	PAGE		PAGE
Mutual, etc., Life Ass'n, Vincent		Philadelphia, Emery v.	147
<i>v.</i>	546	Philip v. Laughlin	66
Myatt v. Ponca City, etc., Co.	226	Phinney v. State <i>ex rel.</i> Stratton	390
Nacogdoches, etc., Co., Commer-		Pierce, Baltimore, etc., Homes v.	622
cial National Bank v.	468	Pietsch v. Milbraith	623
Nagle v. Miller	234	Pim, Warren v.	533, 541
National, etc., Bank, Shaw v. 461,	467	Pimel v. Betjeman	622
Nebraska, Killen v.	315	Pine v. Pine	311
Neely, Matter of	225	Poole and Clarke's Contract, <i>In</i>	
Nesbitt and Potts, <i>Re</i> . 608, 623,	625	<i>re</i>	152
New England, etc., Co., Pave-		Ponca City, etc., Co., Myatt v.	226
sich v.	625	Powell v. Erie R. R. Co.	231
Newland, Greer v.	54, 63, 391	Sheldon v.	470
Nixon, <i>In re</i>	66	Powell & Thomas v. Evan Jones	
Nobles, Tripp v.	302, 314	& Co.	309
Norfolk, etc., Ry. Co., Lorain		Pratt v. Davis	624
Steel Co. v.	610, 622	Pray v. Blanchard Co.	235
Northern Pacific Ry. Co. v. Ameri-		Quigley, State v.	312
can Trading Co.	384, 392, 465	Rady v. McCurdy	67
New York, etc., Co., Cashin v.	148	Rahmel v. Lehendorff	67
O'Brien, Chicago, etc., Ry. Co. v.	391	Rand v. Iowa Central Ry. Co.	63
<i>v.</i> Condon	316	Rankin, McClaine v.	620
<i>v.</i> Williamsburg Sav-		Ray, Ferguson v.	317
ing's Bank	626	Rease v. Kittle	457, 466
O'Connor, Roche v.	224, 228	Reclamation District, San Fran-	
Garibaldi and Cuneo v.	149	cisco Savings Union v.	544
O'Day, Barnsdall v.	617	Reilly v. Empire Life Insurance	
O'Neil v. Helmke	618	Co.	469
Old Home, etc., Co., Schnittger v.	312	Rice, Perkins v.	381, 394
Oliver's Settlement, <i>In re</i>	393	Rideout v. Winnebago Traction	
Onasch v. Zinkel	473	Co.	536, 545
Orange v. State	459, 468	Riggins, <i>Ex parte</i> , Circuit Court	
Oregon, etc., Co., Fireman's, etc.		(134 Fed. Rep. 404)	391
Co. v.	63	Riglander v. Star Co.	311
Pacific, etc., Co., Crane Co. v.	399	Rinehart v. Kansas, etc., Ry. Co.	69
Pakas v. Hollingshead	619	Rippeth, State v.	467
Palmer, Morgan & Co. v.	527, 546	Risdon Iron and Locomotive	
Wills v.	471	Works v. Furness	452, 465
Parker v. State	65	Roberson, State v.	227
Paterson, Barnard v.	231	Roberts, Alabama, etc., R. R. Co.	
Pavesich v. New England, etc.		<i>v.</i>	312
Co.	625	Robertson, Miller v.	147
Pennsylvania, etc., Ins. Co. v.		Roche v. O'Connor	224, 228
Meyer	619	Rockingham, etc., Co. v. Hobbs	
Pennsylvania R. R. Co., Higby v.	229	528, 542
People, Cleveland, etc., R. Co. v.	540	Ross-Lewin v. Germania, etc.,	
<i>v.</i> Mills	65	Co.	393
<i>v.</i> Mol	230	Rothschild, Steefel v.	316
Pernetti v.	539	Roughan, Moroney v.	61, 65
People <i>ex rel.</i> Cossey v. Grout	311	Rouss, Rousseau v.	548
People <i>ex rel.</i> The Provident, etc.,		Rousseau v. Rouss	548
Society v. Miller	233	Ruben v. Great Fingall Consoli-	
Perkins v. Rice	381, 394	dated	144
Pernetti v. People	539	Rural Independent School Dis-	
		trict, Gamble v.	302, 314
		Russell, Shafer v.	611, 625

	PAGE		PAGE
S. P. Smith Lumber Co., <i>In re</i>	531, 541	State, Parker v.	65
Saint Bernard Mining Co., Madisonville Traction Co. v.	468	Phinney v.	390
Sandford, State v.	621	v. Quigley	312
San Francisco Savings Union v. Reclamation District	544	v. Rippeth	467
Sanger Bros., Collum v.	218, 232	v. Roberson	227
Saunders v. Shafto	545	v. Sanford	621
Schnittger v. Old Home, etc., Co.	312	Toney v.	146
Scott v. Hout	473	State of New York, Killam v.	465
Seaboard, etc., Ry., Davis v.	311	Lockner v.	618
Searles, Yazoo, etc., R. R. Co. v.	624	Steam Dredge No. 1, The	537, 540
Second Judicial District Court, State <i>ex rel.</i> Clark v.	467	Steeffel v. Rothschild	316
Shadoan's Administrator v. Cincinnati, etc., R. R. Co.	397	Stetler, Eckes v.	397
Shafer v. Russell	611, 625	Stokes v. Continental Trust Co.	541
Shafto, Saunders v.	545	Stone v. Marshall Oil Co.	64
Shanline v. Wiltsie	314	Stratford-Handock, Frank v.	139, 150
Shaw v. National, etc., Bank	461, 467	Sugar Loaf Dairy Co., Laroe v.	617
Sheldon v. Powell	470	Sullivan v. Jones and Laughlin Steel Co.	149
Shideler, Hohn v.	626	Sutherland, Ames v.	610, 624
Shields v. McMahan	153	Swain v. McMillan	66
Shienebeck, Vogt v.	233	Swartz v. Frank	55, 62
Sing Tuck, United States v.	64	Swift & Co. v. United States	469
Skiles, Taylor v.	59, 62	Syracuse Savings Bank v. Merrick	135, 150
Slater v. Mexican, etc., R. R. Co.	64	Tacoma, etc., Co., Davis v.	153
Slover v. Coal Creek Coal Co.	398	Taylor v. Skiles	59, 62
Smith, Burt v.	544	Thick v. Detroit, etc., Ry. Co.	386, 398
v. Dana	621	Thistle v. Jones	620
Illinois Central R. Co. v.	540	Thompson v. Erie R. R. Co.	231
Smith's Administrator, Buckel v.	394	v. Fairbanks	606, 617
Smits v. Hogan	222, 226	Koefoed v.	614, 619
Smoot v. Judd	395	Matthews v.	53, 70
Snyder v. Fidler	309	Tilly, Vroom v.	472
v. Gates	145	Tinning and Weber, <i>In re</i>	545
Southern, etc., Association, Johnson v.	232	Tod, Industrial & General Trust v.	533, 541
Southern Ry. Co., Beaudrot v.	228	Toledo, etc., Ry. Co., Middletown Nat. Bk. v.	620
Bradford v.	547	Toney v. State	146
Clegg v.	63	Toronto Ry. Co. v. City of Toronto	394
v. Glenn's Adm'r	70	Totten v. Lattan (179 N. Y. 112)	70
Springer, Gage v.	229	Tranter, Finck v.	544
St. Louis, etc., Co. v. Montana Mining Co.	68	Tripp v. Nobles	302, 314
St. Louis, etc., Ry. Co. v. Birdwell	391	Trustees of Dartmouth College v. International Paper Co.	305, 313
St. Louis Transit Co., Wacker v.	547	Turner, Barnes v.	230
Star Co., Riglander v.	311	Tuttle, Mount v.	529, 548
State v. Bell	541	Union & Planters' Bank of Memphis v. Duncan	144
v. Clark	312	Union Ry. Co., Howard v.	303, 314
v. Exum	627	Union Trust Co., Fischer v.	545
<i>ex rel.</i> Clark v. Second Judicial District Court	467	United States, Betts v.	230
v. Jack	312	v. Churchyard	314
v. Mallory	458, 469	v. Evans	299, 309
Orange v.	459, 468	v. Gaynor	543

	PAGE		PAGE
United States, Kepner <i>v.</i>	216, 228	Western Union Telegraph Com-	
<i>v.</i> Sam Yuen	399	pany, Frazier <i>v.</i>	234
<i>v.</i> Sing Tuck	44	Wheeler <i>v.</i> State of New York	465
Swift & Co. <i>v.</i>	469	Whidden, Henry <i>v.</i>	454, 472
United States Casualty Co., Fin-		Whitridge, Graham <i>v.</i>	232, 234
ley <i>v.</i>	395	Will, Fowler <i>v.</i>	621
United States, etc., Ass'n, Gould <i>v.</i>	68	Willats, <i>In re</i>	548
United States, etc., Co., Mills <i>v.</i>	471	Williamsburg Savings Bank,	
		O'Brien <i>v.</i>	626
Valentine <i>v.</i> Healey	70	Wills <i>v.</i> Palmer	471
Van Stan, Van Stan's etc., Co., <i>v.</i>	318	Wilmington, etc., Co., Fulton <i>v.</i>	
Van Stan's, etc., Co. <i>v.</i> Van Stan	318	(133 Fed. Rep. 193)	225
Vila, Laird <i>v.</i>	67	Wilson <i>v.</i> American, etc., Co.	57, 65
Village of Melrose Park <i>v.</i> Dunne-		<i>v.</i> Hinman	541
becke	233	Wiltsie, Shanline <i>v.</i>	314
Vincent <i>v.</i> Mutual, etc., Life		Wimbish, Jamison <i>v.</i>	136, 146
Ass'n	546	Winnebago Traction Co., Ride-	
Vogt <i>v.</i> Shienebeck	233	out <i>v.</i>	536, 545
Vroom <i>v.</i> Tilly	472	Wood, Dowling & Allgood <i>v.</i> . .	543
		Woodall <i>v.</i> Clifton	379, 398
Wacker <i>v.</i> St. Louis Transit Co.	547	Woydt, Broad <i>v.</i>	392
Ware National Bank, Gordon <i>v.</i>	396	Wright, Buster & Jones <i>v.</i> . . .	314
Warren <i>v.</i> Pim	533, 541	Wyland, John D. Plow Co. <i>v.</i> . .	146
Weber, etc., Co., Commonwealth,			
etc., Co. <i>v.</i>	539	Yates, Snyder <i>v.</i>	145
Weller, Bingham <i>v.</i>	67	Yazoo, etc., R. R. Co. <i>v.</i> Searles	625
Wells <i>v.</i> Missouri Edison Co.	460, 464	York, Choisser <i>v.</i>	228
Western, etc., Bank, Holder <i>v.</i>			
	300, 310	Zinkel, Onasch <i>v.</i>	473

INDEX TO LEADING LEGAL ARTICLES

APRIL 15, 1904 - APRIL 15, 1905.

Prepared in collaboration with the Harvard Law School Library. References in heavy-faced type are to editorial comment in the REVIEW.

- Abordage — De la Compétence en Matière d'Actions Naissant d'un. *F. C. Autran*. An examination of the numerous rules for determining jurisdiction over actions arising from collisions at sea, embodying suggestions to the international maritime committee which is seeking uniformity. 32 *J. du Droit International Privé* 44.
- Accomplice, The Evidence of an. *Mian Muhammad Shafi*. Discussing English and Indian law on the subject. 7 *Crim. L. J. of India* 215.
- Acquisition du Territoire et le Droit International, L'. *Ernest Nys*. I. Discussing the various modes of acquiring territory and the legal consequences resulting. 6 *Rev. de Droit Internat.* 359. II. Examining the methods of acquiring territory not a part of a civilized state. *Ibid.* 604. III. Treating of protectorate, spheres of influence, and disguised forms of domination in uncivilized regions. 7 *ibid.* 53.
- Act of State. *L. Satya Chandra Makerje*. 1 *Allahabad L. J.* 249.
- Administration, Letters of, Obtained *Pendente Lite*, The Effect of. *Anon.* Discussing the question of their relation back. 40 *Can. L. J.* 836.
- Admiralty, The Extension to the, of the Fellow Servant Doctrine. *Frederic Cunningham*. 18 *HARV. L. REV.* 294.
- Adopt, Authorities to, Construction of. *P. R. G.* Discussing authority given to widow by deceased husband under Indian law to adopt a son. 14 *Madras L. J.* 231.
- Adultery, Wife Testifying against Husband's Paramour in Cases of. *Edward W. Faith*. Collection of authorities and discussion of principles on which the incompetency of husband and wife to testify against each other is based. 60 *Cent. L. J.* 164. See p. 613.
- Advocate, The Right to Retain an. II. *Edward S. Cox-Sinclair*. Discussing the right of an advocate to refuse upon some personal ground to appear on behalf of a litigant. 29 *L. Mag. & Rev.* 406.
- After-Acquired Property, Covenant to Settle. *Anon.* 49 *Sol. J.* 214, 232.
- Agency by Estoppel. *Walter Wheeler Cook*. 5 *Columbia L. Rev.* 36. p. 400.
- Agent, A Principal's Liability for Acts of his. *Anon.* Discussing state of English authorities on question of unauthorized acts not for benefit of principal. 27 *L. Students' J.* 7.
- Agents, Bribes to. *Anon.* Commenting adversely on a recent Ontario case. 40 *Can. L. J.* 489.
- Agreements of the United States Other than Treaties. *Charles Cheney Hyde*. An inquiry into what agreements the President may make without the co-operation of the Senate. 17 *Green Bag* 229.
- Alien Exclusion. *Blackburn Esterline*. Discussing the federal legislation upon the subject and the decisions of the U. S. Supreme Court as to the constitutionality of this legislation. 38 *Am. L. Rev.* 836.
- Alteration, Discharge of Contracts by. *Samuel Williston*. 18 *HARV. L. REV.* 105, 165.
- Ambassadors and Foreign Ministers, Privileges of. *Charles Noble Gregory*. 3 *Mich. L. Rev.* 173.
- Ancient Lights, The Law of, and its Reform. IV. *J. Andrew Strahan*. Pointing out the unreasonableness of the English law on this subject and suggesting reformative legislation. 30 *L. Mag. & Rev.* 181.
- Ancillary Receiverships in Bankruptcy. *Lee Max Friedman*. 18 *HARV. L. REV.* 519.
- Animals which are Naturally Tame, When and in what Cases may the Owner of, be Liable for their Mischievous or Wrongful Acts? *Walter J. Lots*. 59 *Cent. L. J.* 204.

- Anticipatory Breach, The Doctrine of. *Colin P. Campbell*. 60 Cent. L. J. 64. See p. 475.
- Antiquated Law, A Rhapsody of. *Margaret Center Klingelsmith*. An appreciation of Mr. Maitland's recent edition of the Year Books. 52 Am. L. Reg. 755.
- Anti-Trust Act and the Merger Case, The. *Victor Morawetz*. 17 HARV. L. REV. 533.
- Appeals on Matters of Federal Jurisdiction. *H. B. Higgins*. 2 Commonwealth L. Rev. 19.
- Appeals, Second. *Satish Chandra Bauerji*. Discussing the restrictions upon the right to a second appeal, under the Indian Code. 2 Allahabad L. J. 93.
- Appellate Tribunals for the Colonies. *Robert Stout*. 2 Commonwealth L. Rev. 3.
- Arbitration, Industrial, and Common Law Rights. *C. E. Weigall*. Commenting adversely upon a recent case under the Australian Arbitration Act. 1 Commonwealth L. Rev. 248.
- Arbitration, The Venezuelan, Once More: Facts and Law. *Rudolf Dulon*. 38 Am. L. Rev. 648.
- Assessment Practice, Special. *George A. Mason*. Summarizing the law of Illinois upon special assessments, with some practical suggestions as to conducting cases. 37 Chic. Leg. News, 171, 179.
- Assignability of Contract. *Frederic C. Woodward*. 18 HARV. L. REV. 23.
- Associations, Irregular. *George Wharton Pepper*. A preliminary study for a chapter on the law of associations which the writer has in course of preparation. 52 Am. L. Reg. 409, 504, 576.
- Associations, Transfer of Interests in. Transfer of a Partner's Share. *George Wharton Pepper*. A résumé of the laws governing the transfer of interests in partnerships and shares in corporations. 52 Am. L. Reg. 737; 53 *ibid.* 240.
- Assumpsit, The Limitations of the Action of, as Affecting the Right of Action of the Beneficiary. I. *Crawford D. Henning*. Arguing that the English rule that the beneficiary cannot recover in assumpsit is a matter of adjective rather than substantive law. 52 Am. L. Reg. 764; 53 *ibid.* 112.
- Assurance contre les Risques de Guerre, Les Principales Clauses d'. *Émile Audouin*. A comment on some questions raised by the terms of the special war-risk policies agreed upon by the marine insurance companies. 32 J. du Droit Internat. Privé 146.
- Assurance des Risques de Guerre, De Quelques Questions Relatives à l'. *Émile Audouin*. 31 J. du Droit Internat. Privé 1025. See page 474.
- Attaching Creditor, The Mesne Rights of, in Probate Proceedings in Massachusetts. *Joseph M. Sullivan*. 67 Alb. L. J. 10.
- Australia, Maritime Law and Jurisdiction in. I. *F. L. Stow*. First of a series of articles summarizing the results of Australian legislation and of the provisions of the Australian Constitution in regard to maritime matters. 2 Commonwealth L. Rev. 110.
- Authority, Implied Warranty of. *N. W. Hoyles*. Discussing the development of the doctrine. 40 Can. L. J. 685.
- Babylonian Law. *Ross G. Murison*. A brief outline of the Code of Hammurabi. 3 Can. L. Rev. 439.
- Bankers' Rights on Forged Signatures. *Charles M. Holt*. 3 Can. L. Rev. 457. Discussing a recent Canadian case, *Ewing v. Dominion Bank*. See p. 140.
- Banking in South Africa, The Law of. I., II. *George T. Marice*. The first two of a series to deal with the differences between the English and the Roman-Dutch law of Banking. 21 South African L. J. 355; 22 *ibid.* 46.
- Bankrupt Partnerships and Partners, Distribution of Assets of. *William J. Shroder*. 18 HARV. L. REV. 495.
- Bankruptcy, Ancillary Receiverships in. See *supra*, under Ancillary Receiverships.
- Bankruptcy, Penal Consequences of, under the Bankruptcy Laws of England and the United States. *E. W. Hansell*. 56 J. Soc. Comp. Leg. n. s. 271.
- Bankruptcy, Provability of Tort Claims in. *Stanley Fols*. 52 Am. L. Reg. 473.
- Belligerent État, De l'Émission sur le Territoire d'un État Neutre d'un Emprunt au Profit d'un. *Edouard Cailleux*. Examining the rule that neutrality is not violated by subscription by private parties to a loan of a belligerent. 31 J. du Droit Internat. Privé 620.
- Belligerent, The Right of a, to destroy a Captured Prize. *Francis F. Swayze*. 18 HARV. L. REV. 284.
- Beneficiary, The Limitations of the Action of Assumpsit as Affecting the Right of Action of the. See *supra*, under Assumpsit.
- Bloodhound Evidence. *Anon.* Reviewing American decisions on the admissibility of bloodhound evidence in criminal trials. 8 L. Notes (N. Y.) 364.

- Boats and Vessels, Validity and Effect of State Laws Giving Liens on. *John T. Marshall*. A short article collecting the authorities. 60 Cent. L. J. 86.
- Bona Fide Purchasers from Bailees, Title of. *Colin P. Campbell*. Stating the present rule and the theory upon which it is based. 59 Cent. L. J. 264.
- Bribes to Agents. See *supra*, under Agents.
- British North America Act, Inapplicability of Decisions under the, to Cases arising under the Constitution of the Commonwealth. *A. Inglis Clark*. 1 Commonwealth L. Rev. 193.
- Burden in Criminal Cases. *R. Srinivasa Aiyangar*. Discussing Indian law and English authorities on burden of proof. 1 Crim. L. J. of India 235.
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- Burden of Proof, Presumptions and, in Actions against Carriers for Injury to Passengers and Damage to Freight. *R. O. Summerville*. 60 Cent. L. J. 123.
- Business and Commercial Relations, Interference with, by Third Parties. *Wm. H. Warren*. Discussing boycotts and kindred practices. 40 Can. L. J. 794; 60 Cent. L. J. 305.
- Cancellation of a Fire Insurance Policy, The. *M. C. Phillips*. 59 Cent. L. J. 123.
- Carriers, Interstate, Chief Justice Marshall on Federal Regulation of. *E. Parmelee Prentice*. Discussing *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, and tracing the development of, and limitations upon, the doctrines there laid down. 5 Columbia L. Rev. 77.
- Carriers, Presumptions and Burden of Proof in Actions against, for Injury to Passengers and Damage to Freight. See *supra*, under Burden of Proof.
- Charging the Distributive Shares of an Intestate's Grandchildren with a Debt Owed to the Intestate by their Parent who Dies in the Lifetime of the Intestate. *Henry M. Dowling*. 59 Cent. L. J. 305.
- Charitable Enterprises, Subscriptions and Contributions to. *Emilie M. Bullowa*. Discussing the necessity of request and acceptance, and the reversion to the donor of a gift not used for the purpose specified. 67 Alb. L. J. 70.
- Check, Wrongful Dishonor of, Elements and Measure of Damages in an Action by a Depositor against a Bank for the. *Glenda Burke Slaymaker*. 60 Cent. L. J. 144.
- Child, Responsibility of a, for its Torts and Wrongs. *Theodore Sutro*. 38 Am. L. Rev. 371.
- Christian Science and the Law. *Irving E. Campbell*. 10 Va. L. Reg. 285.
- Citizenship of the United States as a Legal Status. *Emlin McClain*. Containing an intimation that inhabitants of our new possessions are citizens. 13 Am. Law. 57.
- Civil Capacity, The Relation of the Insanities to Criminal Responsibility and. IV. *Sir John Batty Tuke* and *Charles R. A. Howden*. 16 Jurid. Rev. 361.
- Civil Death in Virginia: Suits against Felons. *W. Allen Perkins*. Concluding that there is no civil death in Virginia, and that a felon can be sued under Virginia Code. 10 Va. L. Reg. 849.
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- Clothing Establishment, Deposit or Bailment in a. *Nathan Newmark*. 58 Cent. L. J. 405.
- Co-Defendants, Res Judicata between. *K. S. Ramaswami Sastri*. Discussing and classifying the decisions upon the subject. 3 Madras Leg. Comp. 95.
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- Colonies, Appellate Tribunals for the. See *supra*, under Appellate Tribunals.
- Combination Laws, The, as Illustrating the Relation between Law and Opinion in England during the Nineteenth Century. *A. V. Dicey*. 17 HARV. L. REV. 511.
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- Companies, Liquidation of, in the Transvaal, The. *Anon.* 22 South African L. J. 56.
- Companies, Reconstruction of. *Frank Evans*. Defining reconstruction and suggesting modes of accomplishing it. 20 L. Quar. Rev. 392.
- Comparative Injuries, The Rule of, in the Law of Injunction. *Glenda Burke Slaymaker*. A discussion of the doctrine that an injunction will not be issued if the good that may result is not commensurate with the harm. 60 Cent. L. J. 23.
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- "Concurrent," Some Aspects of the Meaning of the Word, in Use with Fire Insurance Policies. *M. C. Phillips*. A brief examination of the few cases in point. 59 Cent. L. J. 62.
- Conditional Sales. *D. Witherspoon*. Distinguishing conditional sales from chattel mortgages. 1 N. C. J. of L. 488.
- Condition, Estates upon. *E. E. Ledbetter*. A summary of the law on the subject. 19 Chic. L. J. 1239.
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- Consolidations or Trusts. *Theodore D. Gottlieb*. An outline summary of the origin, growth, and development of corporations, with a review of the first attempts towards trust consolidation. 27 N. J. L. J. 165.
- Constitutional Law of the United States as Moulded by Daniel Webster. *Everett P. Wheeler*. 13 Yale L. J. 366.
- Constitutional Law, Present Problems of. *J. W. Burgess*. 19 Pol. Sci. Quar. 545.
- Constitutional Powers, The Expansion of, by Interpretation. *Paul Fuller*. 5 Columbia L. Rev. 193.
- Contingent Remainders, Remoteness of. *H. W. E.* Showing the present state of English law in the various classes of cases, and the effect of the Act of 1877. 49 Sol. L. J. 397.
- Contract, Assignability of. See *supra*, under Assignability.
- Contracts, Critical Analysis of the Law as to Mistake in its Effect upon. *Truman Post Young*. 38 Am. L. Rev. 334. See p. 155.
- Contracts, Discharge of, by Alteration. See *supra*, under Alteration.
- Contracts, for Benefit of Third Persons, Suits on. *M. E. E. Kerr*. 66 Alb. L. J. 312. See p. 141.
- Contributory Negligence, Acts in Emergencies as Constituting. *Glenda Burke Slaymaker*. 58 Cent. L. J. 463.
- Contributory Negligence, A Question of: Compensation to Rescuers. See *supra*, under Compensation.
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- Corporation, The Crown as. *W. Harrison Moore*. 20 L. Quar. Rev. 351.
- Corporation, The State, as Party in Federal Courts. *Francis E. Baker*. 13 Am. Law. 7.
- Corporations, Business, Is the Judgment of Directors of, Conclusive in Determining the

- Value of Property taken in Payment of its Stock? *Henry P. Molloy*. 66 Alb. L. J. 207.
- Corporations, Federal Control of. *E. Hilton Jackson*. Referring to the first annual report of the Commissioner of Corporations, James R. Garfield. 4 Can. L. Rev. 166.
- Corporations, Federal Control of. *Thomas Thacher*. Arguing that the purpose of legislation providing such control is unconstitutional. 14 Yale L. J. 301.
- Corporations, Federal Regulation of, a Dangerous Departure. *John E. Parsons*. Contending that it would lead to too great a change in our political system. 17 Green Bag 135.
- Corporations, Federal Regulation of, a Public Necessity. *William J. Curtis*. Maintaining that corporations need relief from continual harassment by state legislatures. 18 Green Bag 138.
- Corporations in the District of Columbia. *Fred. Deunnett*. 32 Wash. L. Rep. 758. See p. 319.
- Corporations, Judge Quarels on the Federal Control of. *Anon.* Advocating such control as a remedy for the present confusion of state laws and loss of remedies to creditors. 22 Chic. L. J. 253.
- Corporations of Two States. *Joseph H. Beale, Jr.* 4 Columbia L. Rev. 391.
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- Courts of a Foreign Nation, To what Extent should Judicial Action by, be Recognized? *Mr. Justice Kennedy*. 6 J. Soc. Comp. Leg. n. s. 106. See p. 401.
- Covenants for Title, Damages for Breach of. *Anon.* A discussion of two English cases, one of which gives plaintiff his costs in arbitrating with an incumbrancer, but not the costs of an appeal. 49 Sol. J. 346.
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- Criminal Cases, Burden in. See *supra*, under Burden.
- Criminal Cases, Compensation in. See *supra*, under Compensation.
- Criminal Law as Affected by Commonwealth Legislation. *Charles T. Russell*. 2 Commonwealth L. Rev. 14.
- Criminal Law, Federal Enforcement of. *J. B. Mackenzie*. Expressing the opinion that the Dominion Government has no jurisdiction in criminal offenses. 41 Can. L. J. 276.
- Criminal Procedure, Reform in. *Everett P. Wheeler*. 4 Columbia L. Rev. 356.
- Criminal Proceedings, Several Modes of Instituting, in Pennsylvania. *John C. Bell*. 61 Leg. Int. 529.
- Criminal Responsibility, The Relation of the Insanities to, and Civil Capacity. See *supra*, under Civil Capacity.
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- Crown as Corporation, The. See *supra*, under Corporation.
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- Cy-Pres Doctrine with Reference to the Rule against Perpetuities, The. *James Quarles*. 38 Am. L. Rev. 683. See p. 156.
- Damages, Elements and Measure of, in an Action by a Depositor against a Bank for the Wrongful Dishonor of his Check. See *supra*, under Check.
- Damages for Breach of Covenants of Title. See *supra*, under Covenants.
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- Decisions of the Judicial Year, Noteworthy. *Anon.* A résumé of English decisions. 117 L. T. 379, 405, 427.
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- Delivery of Policy as Condition Precedent to Complete Contract of Insurance. *Gulford A. Deitch*. Consisting principally of quotations from decisions. 59 Cent. L. J. 28.
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- Deposit or Bailment in a Clothing Establishment. See *supra*, under Clothing Establishment.
- Deposits Received by Insolvent Banks, The Law Relating to. *Albert S. Bolles*. 52 Am. L. Reg. 438.
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- Directors of Business Corporations, Is the Judgment of, Conclusive in Determining the Value of Property Taken in Payment of its Stock? See *supra*, under Corporations.
- Discharge of Contracts by Alteration. See *supra*, under Alteration.
- Dissenting Opinions. *V. H. Roberts*. An argument in support of the practice of reporting them. 39 Am. L. Rev. 23.
- Domicil and Situation of Property, Death Duties Considered in Connection with. See *supra*, under Death Duties.
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- Droit International, Acquisition du Territoire et le. See *supra*, under Acquisition.
- Droit International, La Guerre Russo-Japonaise et le. *M. H. Nagaoka*. Reviewing the conduct of Japanese throughout and justifying it. 6 Rev. de Droit Internat. 461.
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- Electricity, Law Applicable to the Use of, in Modern Industrial Life. *Helm Bruce*. 12 Am. Law. 290, 337.
- Emergencies, Acts in, as Constituting Contributory Negligence. See *supra*, under Contributory Negligence.
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- Employers' Liability Insurance Policies, Liability of Insurers and Rights of Employees under. *Henry M. Dowling*. 59 Cent. L. J. 5. See p. 154.
- Emprunt du Profit d'un État Belligérant, Emission d'un, sur le Territoire d'un État Neutre. See *supra*, under Belligérant.
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- Equitable Mortgages. *A. H. Marsh*. 24 Can. L. T. 134.
- Equitable Procedure, Power of the Legislature to Abolish a Rule of, by Enacting a Remedy at Law, where no Prohibitory Words are Used in such Enactment. *T. A. Sherwood*. Discussing a Missouri statute and decisions thereunder. 59 Cent. L. J. 44.
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- Equity, The Effect of Time in Barring Claims in. *Anon.* Sketching, in a broad way, the English law upon the subject, with a brief summary in conclusion. 49 Sol. J. 181, 201, 215, 233.
- Equity, The Responsive Answer in, Considered as Evidence for the Defendant. *John Marshall Gest*. 52 Am. L. Reg. 537. See p. 155.
- Estates upon Condition. See *supra*, under Condition.
- Estoppel, Agency by. See *supra*, under Agency.
- Estoppel, A Misapplication of the Doctrine of. *Thaddeus D. Kenmeson*. A review of New York cases holding a principal estopped from denying the authority of an agent, where such authority is dependent upon an extrinsic fact known only to agent. 5 Columbia L. Rev. 261.
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- Evidence, Admissibility of, to Establish Oral Contemporaneous Inducing Promises to Affect Written Instruments in Pennsylvania. *Stanley Fols*. 52 Am. L. Reg. 601.
- Evidence, A New York Code of. III. *David Dudley Field* and *William Rumsey*. 5 Brief 119.
- Evidence, Bloodhound. See *supra*, under Bloodhound.
- Evidence, Extrinsic, in Aid of Interpretation. *Sidney L. Phipson*. 20 L. Quar. Rev. 245. See p. 71.
- Evidence for the Defendant, The Responsive Answer in Equity Considered as. See *supra*, under Equity.
- Evidence in the Case, Is the Presumption of Innocence in Criminal Cases to be Weighed as? *Robert A. Edgar*. 59 Cent. L. J. 282.
- Evidence of an Accomplice, The. See *supra*, under Accomplice.
- Evidence of Intention, Propriety of Direct. *Colin P. Campbell*. 58 Cent. L. J. 445.
- Evidence to Prove Negligence of Master in Employing Incompetent or Unfit Servants. *Seymour D. Thompson*. 60 Cent. L. J. 104.
- Exemptions of Property from Municipal Taxation. *Eugene McQuillin*. Containing good collection of authorities. 60 Cent. L. J. 43.
- Expert, The Physician as an. II. *H. B. Hutchins*. 2 Mich. L. Rev. 687.
- Factory and Workshop Act, 1901, Payment of Expenses Incurred under the. Parts I. and II. *Anon.* Concerning the apportionment of such expenses between landlord and tenant. 48 Sol. J. 732, 739.
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- Federal Control of Corporations. See *supra*, under Corporations.
- Federal Control of Corporations, Judge Quarels on the. See *supra*, under Corporations.
- Federal Control of Insurance Corporations. *William R. Vance*. Giving arguments for and against, and concluding that federal control is neither desirable nor constitutional. 17 Green Bag 83.
- Federal Courts, The State Corporation as a Party in. See *supra*, under Corporation.
- Federal Jurisdiction, Appeals on Matters of. See *supra*, under Appeals.
- Federal License or National Incorporation. *Horace L. Wilgus*. Reviewing Commissioner Garfield's Report on corporations engaged in interstate commerce; approving many features, but disagreeing with its conclusion in favor of a Federal License Plan. 3 Mich. L. Rev. 264.
- Fellow Servant Doctrine, Extension to the Admiralty of the. See *supra*, under Admiralty.
- Feudal Tenures of Western India. III. Maratha Jaghirs. *J. A. Saldanha*. 6 Bombay L. Rep. 97.
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- Fire Insurance Policy, The Cancellation of a. See *supra*, under Cancellation.
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- Foreigners, Jurisdiction in Actions between. *A. Pillet*. 18 HARV. L. REV. 325.
- Foreign Nation, Courts of a, To what Extent should Judicial Action by, be Recognized? See *supra*, under Courts.
- Forged Signatures, Bankers' Rights on. See *supra*, under Bankers' Rights.
- Forged Transfers of Stock—Another View. *James Barr Ames*. 17 HARV. L. REV. 543.
- Former Jeopardy. *O. B. Harvey*. Distinguishing the plea of former jeopardy, using the word in its strict sense, from that of former acquittal or conviction. 10 Va. L. Reg. 410.
- Fraud, Legal. *Silas Alward*. Discussing the origin and meaning of the term in the light of judicial decisions. 24 Can. L. T. 225.
- Fraud, When and in what Cases will a Representation as to the Value of Real or Personal Property be Sufficient to Predicate an Action for. *Walter J. Lutz*. 58 Cent. L. J. 484.
- Fraudulent Alterations of Cheques, The. *N. G. Pilcher*. Maintaining in adverse criticism of a local case that (1) negligence of drawer should protect the bank; (2) existence of negligence should be left to the jury. 2 Commonwealth L. Rev. 57.
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- Free Speech and Free Press in Relation to Police Power of the State. *P. L. Edwards*. Arguing that statutes prohibiting the publication of criminal news are constitutional. 58 Cent. L. J. 383.
- Future Interests in Land. *Edward Jenks*. An attempt to restate in short and simple form the doctrines of future interests in land. 20 L. Quar. Rev. 280.
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- Gambling and Cognate Vices. *John R. Dos Passos*. Contending that such vices are merely *mala prohibita*, and advocating less harsh laws respecting them. 14 Yale L. J. 9.
- German Civil Code, The Making of the. *A. Pearce Higgins*. A brief history of German law explaining how the national spirit made possible its unification in the Code of 1896. 6 J. Soc. Comp. Leg. N. S. 95.
- Gift *Causa Mortis*, When may Promissory Notes, Mortgages, Contracts, and Bonds, without Indorsement or Assignment in Writing, Become the Subjects of? *Walter J. Lutz*. 60 Cent. L. J. 244.
- Gifts to a Class, The Construction of. *John S. Mackay*. Discussing whether the rule of *Andrews v. Partington* is law in Scotland. 12 Scots L. T. 139.
- Gold Law, Proposed for the Transvaal, The. *George T. Morice*. Showing changes from present law. 21 S. African L. J. 123.
- Guaranty, Notice of Acceptance in Contracts of. *W. P. Rogers*. Containing a thorough examination of all the cases and contending that the requirement of notice in contracts of guaranty is anomalous. 5 Columbia L. Rev. 215.
- Guerre, les Risques de, Les Principales Clauses d'Assurance contre. See *supra*, under Assurance.
- Guerre, Risques de, De Quelques Questions Relatives à l'Assurance des. See *supra*, under Assurance.
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- Homicide Cases, Suicidal Declarations in. *G. M. Dahl*. 59 Cent. L. J. 103.
- Illegal Act, The Plaintiff's, as a Defense in Actions of Tort. *Harold S. Davis*. 18 HARV. L. REV. 505.
- Illinois, Is Polygamy permitted by the Laws of? *John F. Geeting*. 66 Alb. L. J. 309.
- Impeachment of Witnesses. *William Trickett*. Discussing Pennsylvania law. 8 Dickinson Forum 245.
- Impeachment of Witnesses by Proof of Specific Wrongful Acts. *James A. Yantis*. Elaborate article with full citation of authority. 59 Cent. L. J. 143, 164, 184.
- Indemnity Contract, Fire Insurance as an. *Koy Elias Kessler*. 59 Cent. L. J. 364.
- Independent Contractor, Liability of an Employer for the Torts of an. See *supra*, under Employer.
- India, Feudal Tenures of Western. See *supra*, under Feudal Tenures.
- Individual Liberty, The Judicial History of. V.-XI. *Van Vechten Veeder*. 16 Green Bag 317, 395, 471, 529, 591, 673, 725.
- Industrial Arbitration and Common Law Rights. See *supra*, under Arbitration.
- Infants, The Rights and Liabilities of. *Hugh Pettitt*. 26 L. Stud. J. 143.
- Injunction against a Receiver Appointed by a Federal Court, Has a State Court Jurisdiction to Issue an? *W. A. Coutts*. 59 Cent. L. J. 382. See p. 235.
- Injunction against Cutting Timber — Method of Procedure. *Robert C. Jackson*. 10 Va. L. Reg. 964.
- Injunctions, Labo. Strikes and. *P. L. Edwards*. 59 Cent. L. J. 23.
- Injunction, The Rule of Comparative Injury in the Law of. See *supra*, under Comparative Injury.
- Injuries Occasioned by Third Persons. *G. S. Holmsted*. Pointing out some apparently contradictory propositions found in the authorities. 40 Can. L. J. 769.
- Inns of Court and Some of their Members, The. *C. E. A. Bedwell*. Dealing with the early history of the institution. 1 Commonwealth L. Rev. 256.
- Insanities, The Relation of the, to Criminal Responsibility and Civil Capacity. See *supra*, under Civil Capacity.
- Insanity and the Law of Negligence. *Wm. B. Hornblower*. Maintaining that an insane person should not be liable for negligence, whether of misfeasance or of nonfeasance. 5 Columbia L. Rev. 278.
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- Insurance Corporations, Federal Control of. See *supra*, under Federal Control.
- Insurance, Delivery of Policy as Condition Precedent to Complete Contract of. See *supra*, under Delivery.
- Insurance, Fire, as an Indemnity Contract. See *supra*, under Indemnity Contract.
- Insurance, Life, and Death at the Hands of the Law. *H. N. G.* Maintaining view that recovery should be allowed. 8 L. Notes (N. Y.) 465.
- Insurers, Liability of, and Rights of Employees under Employers' Liability Insurance Policies. See *supra*, under Employers' Liability Insurance.
- Intention, Propriety of Direct Evidence of. See *supra*, under Evidence.
- Intercolonial Rights, An Early Decision on. *Chauncey G. Parker*. 18 HARV. L. REV. 483.
- Interference with Business and Commercial Relations by Third Parties. See *supra*, under Business.
- Interference with Contracts and Business in New York. *E. W. Huffcut*. 18 HARV. L. REV. 423.
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- International Law and the Russo-Japanese War. See *supra*, under Droit International.
- International Law in Legal Education. See *supra*, under Education.
- International Law, Questions of, Arising from the Russo-Japanese War. I.-VIII. *Amos S. Hershey*. 16 Green Bag 307, 375, 452, 538, 595, 659, 744, 814.
- International Law, Some Problems of. *Charles Noble Gregory*. Discussing questions arising in the Russo-Japanese War. 14 Yale L. J. 82.
- International Law, The Acquisition of Territory and. See *supra*, under Acquisition.
- International Law, The Legal Nature of. *James B. Scott*. 5 Columbia L. Rev. 124. See p. 476.
- International Law, The Panama Situation in the Light of. *William Cullen Dennis*. 52 Am. L. Rev. 265.

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- International Privé, La Codification du Droit. See *supra*, under Codification.
- Interpretation, Extrinsic Evidence in Aid of. See *supra*, under Evidence.
- Interpretation, The Expansion of Constitutional Powers by. See *supra*, under Constitutional Powers.
- Interstate and Foreign Commerce, Concurrent Power of the States to Regulate. *David Walter Brown*. 5 Columbia L. Rev. 298.
- Interstate and Foreign Commerce, The Exclusive Power of Congress to Regulate. *David Walter Brown*. 4 Columbia L. Rev. 490.
- Interstate Carriers, Chief Justice Marshall on Federal Regulation of. See *supra*, under Carriers.
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- Intestate, Charging the Distributive Shares of an Intestate's Grandchildren with a Debt Owed to the Intestate by their Parent who Dies in the Lifetime of the. See *supra*, under Charging.
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- Jeopardy, Former. See *supra*, under Former Jeopardy.
- Jeopardy, Previous, Doctrine of. *Elmer E. Scott*. An article collecting all the authorities. 60 Cent. L. J. 184.
- Judgments, History of the Adoption of Sec. I. of Art. IV. of the U. S. Constitution, and a Consideration of the Effect of that Section and of Federal Legislation on. *George P. Costigan, Jr.* 4 Columbia L. Rev. 470. See p. 236.
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- Judicial Legislation in New York. *Wilbur Larremore*. Pointing out the tendency of the Court of Appeals to repudiate the doctrine of *stare decisis*, and advocating codification. 14 Yale L. J. 312.
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- Jurors, Civil Service Classification of. *Joseph M. Sullivan*. Advocating a higher intellectual and moral qualification for jurors. 67 Alb. L. J. 77.
- Jury, Judicial Constitutional Amendment as illustrated by the Devolution of the Institution of the, from a Fundamental Right to a Mere Method of Procedure. See *supra*, under Judicial Constitutional Amendment.

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- Jury, Test by which to Determine whether the Case is for the. *Colin P. Campbell*. 59 Cent. L. J. 224.
- Jury, Trial by, in Germany. *Burt Estes Howard*. 19 Pol. Sci. Quar. 650.
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- Labor Strikes and Injunctions. See *supra*, under Injunctions.
- Labor, Validity of Legislation Limiting Hours of. *Anon.* Attacking the constitutionality of "eight hour" laws. 58 Cent. L. J. 361.
- Land Law, Present Complexity of the, and its Remedy. *J. E. Hogg*. 20 L. Quar. Rev. 292.
- Land Transfer Question, The. *W. Strachan*. Suggesting a revised system of registration of title. 20 L. Quar. Rev. 427.
- "Last Clear Chance." *Thomas W. Shelton*. 10 Va. L. Reg. 301.
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- Law, Definition of. *Melville M. Bigelow*. Criticising and demolishing piecemeal Blackstone's definition of law, and substituting another in its place. 5 Columbia L. Rev. 1.
- Law, Judge-made. *A. H. F. Lefroy*. Suggesting certain lines along which, according to the writer, judges make, rather than interpret, law. 20 L. Quar. Rev. 399.
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- Legitimation by Subsequent Marriage. *Sir Dennis Fitzpatrick*. A codification of existing law, domestic and foreign, with arguments for and against the common law, written in aid of contemplated legislation in Jamaica. 6 J. Soc. Comp. Leg. N. S. 22.
- Letter, a Private Personal, Having no Literary Value, Right to Enjoin the Publication of. *Anon.* Concluding that the cases establish a right to enjoin publication of the product of one's brain, whether of literary value or not. 60 Cent. L. J. 281.
- Libel, Publication of, by Dictation to Stenographer. *Anon.* Taking an adverse view. 8 L. Notes (N. Y.) 467.
- Libel, The Right of Privacy and its Relation to the Law of. *Elbridge L. Adams*. Pointing out that there is no common-law right of privacy. 39 Am. L. Rev. 37.
- Liberty, Individual, The Judicial History of. See *supra*, under Individual Liberty.
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- Light, The Right to. *Charles Thwaites*. 26 L. Stud. J. 127.
- Lights, Ancient, The Law of, and its Reform. See *supra*, under Ancient Lights.
- Liquidation of Companies in the Transvaal. See *supra*, under Companies.
- Lis Pendens*, The Doctrine of, as applied in India, and its Application to Sales in Execution of Decrees. *Abdul Karim Khan*. Indicating divergence of Indian law at several points from that of English courts. 2 Allahabad L. J. 1, 19, 35, 57.
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- Malicious Prosecution, Actions for. *Silas Alward*. Considering chiefly the question how far defendant's obtaining opinion of counsel is to be considered probable cause. 40 Can. L. J. 296.
- Manufacturer, The Liability of a, for Injuries to Third Persons from Improperly Constructed Articles. *Glenda Burke Slaymaker*. 59 Cent. L. J. 324.
- Marine Disaster, Burden of Proof in. *Frederic Cunningham*. See *supra*, under Burden of Proof.
- Marine Insurance, "Thieves" in Relation to a Policy of. *H. Birch Sharpe*. 20 L. Quar. Rev. 300.
- Maritime Law and Jurisdiction in Australia. See *supra*, under Australia.
- Marriage, La Doctrine Française du, dans le Conflit des Lois. See *supra*, under Conflit des Lois.
- Marriage, Conditions in Restraint of. *Anon.* Pointing out the distinction to be taken between realty and personalty as to such conditions. 40 L. J. 235.
- Marriage, Legitimation by Subsequent. See *supra*, under Legitimation.
- Married Women before the Law in North Carolina. *Thomas Ruffin*. 1 N. C. J. of L. 230.
- Married Women's Property Law in Ontario. *Geo. S. Holmsted*. 25 Can. L. T. 1, 53, 105.
- Marshaling the Assets of a Decedent's Estate for the Payment of Debts, The Equitable Doctrine of. *C. B. Garnett*. 11 Va. L. Reg. 175. See p. 221.
- Master Defendant, Non-Resident, Right of Removal of Causes on Behalf of. *John J. McSwain*. Showing when the resident defendant is a "sham" defendant. 60 Cent. L. J. 303.
- Master, Liability of, to Third Persons for the Negligence of a Stranger Assisting his Servant. *Floyd R. Mechem*. 3 Mich. L. Rev. 193.
- Medieval England, The Gage of Land in. See *supra*, under Gage.
- Medieval Law of Intestacy, The. See *supra*, under Intestacy.
- Mental Disturbances and the Consequences thereof as Elements of Damages. See *supra*, under Damages.
- Merger Case, The Anti-Trust Act and the. *Victor Morawetz*. 17 HARV. L. REV. 533.
- Merger Case, The Conflicting Opinions in the. *Bruce Wyman*. 16 Green Bag 298.
- Merger Decision, The. *John S. Wise*. Supporting the decision. 8 L. Notes (N. Y.) 325.
- "Mines" and "Minerals," The Meaning of the Words in Legal Documents and Statutory Enactments, as Interpreted by the Courts. *R. B. Michell*. 14 Madras L. J. 39, 163.
- Mining Claim Lode, Should the Grantee of a, be Confined within the Vertical Boundaries of his Claim? *John A. Ewing*. Maintaining that an amendment confining a grantee within the vertical boundaries of the claim would not simplify the present confused state of mining law. 12 Am. Law. 540.
- Mistake, Critical Analysis of the Law as to, in its Effect upon Contracts. See *supra*, under Contracts.
- Money-Lender's Act, Recent Decisions upon. *Hugh H. L. Bellot*. Maintaining that they have made the act nugatory. 29 L. Mag. & Rev. 315.
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- Mortgages, Equitable. See *supra*, under Equitable Mortgages.
- Mortgages of Moveables. *Anon.* Discussing briefly the state of the Indian law on the subject, and the need of legislation. 6 Bombay L. Rep. 193.
- Motive of the Defendant, Should the, Affect the Question of his Liability? — The answer of one class of trade and labor cases. See *supra*, under Labor Cases.
- Motive, the Wrongful, of the Actor, How far an Act may be a Tort because of. *J. B. Ames*. 18 HARV. L. REV. 411.
- Moveables, Mortgages of. See *supra*, under Mortgages.

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- Municipal Liability for Injuries Resulting from Defective and Inadequate Sewerage. *Glenda Burke Slaymaker*. 60 Cent. L. J. 224.
- Municipal Taxation, Exemptions of Property from. See *supra*, under Exemptions.
- Murderer, May a, Profit by his Crime? *L. P. M.* Considering the question whether a murderer can succeed to the property of the deceased to which, except for the crime, he would be entitled. 1 N. C. J. of L. 532.
- Murray River Boundary, The. *W. Harrison Moore*. 1 Commonwealth L. Rev. 157.
- Names of Literary Compositions. *Bernard C. Steiner*. Discussing rights of editors and authors, with an elaborate citation of cases. 16 Green Bag 643.
- National Control of the Pollution of Public Waterways. *Charles Claflin Allen*. Arguing in support of the decision of the U. S. Supreme Court in the recent case of *Missouri v. Illinois*. 38 Am. L. Rev. 321.
- National Incorporation, Federal License or. See *supra*, under Federal License.
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- Negligence, Insanity and the Law of. See *supra*, under Insanity.
- Negligence in the Construction or Sale of Chattels, Liability of a Manufacturer or a Vendor for, to Persons with whom he has no Contractual Relations. *Charles Loring*. 58 Cent. L. J. 365.
- Negligence in the Transmission and Delivery of Messages, Liability of Telegraph Companies for. *Graham B. Smedley*. 10 Va. L. Reg. 392, 507.
- Negligence of Master in Employing Incompetent or Unfit Servants, Evidence to Prove. See *supra*, under Evidence.
- Negligence, The Psychology of. *Charles Morse*. Contending that mental attitude should not be regarded in determining the existence of negligence, and that the proper standard is objective. 41 Can. L. J. 233.
- Negro before the Supreme Court, The. *B. Frank Dake*. An examination of all the cases before the Supreme Court in which the political or civil status of the negro has been involved. 66 Alb. L. J. 238.
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- Nervous Shock, Tort Liability for Mental Disturbance and. *Francis M. Burdick*. 5 Columbia L. Rev. 179.
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- New Trials, Abuse of. *Everett P. Wheeler*. 3 Mich. L. Rev. 257.
- New York, Interference with Contracts and Business in. See *supra*, under Interference.
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- Northern Securities Decision, The. *George F. Canfield*. An elaborate adverse comment. 4 Columbia L. Rev. 315.
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- Notice of Acceptance in Contracts of Guaranty. See *supra*, under Guaranty.
- Ontario, Married Women's Property Law in. See *supra*, under Married Women.
- Ontario, The Statutes of. 1904. *N. W. Hoyles*. 24 Can. L. T. 251.
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- Open Shop, Maintenance of the. *Bruce Wyman*. A review of the decisions, concluding that the liability of labor unions for procuring the discharge of non-union laborers is an application of the law of conspiracy. 17 Green Bag 21.
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- Panama Situation in the Light of International Law, The. See *supra*, under International Law.
- Parol Evidence Rule, A Brief History of the. *John H. Wigmore*. 4 Columbia L. Rev. 338. See p. 72.

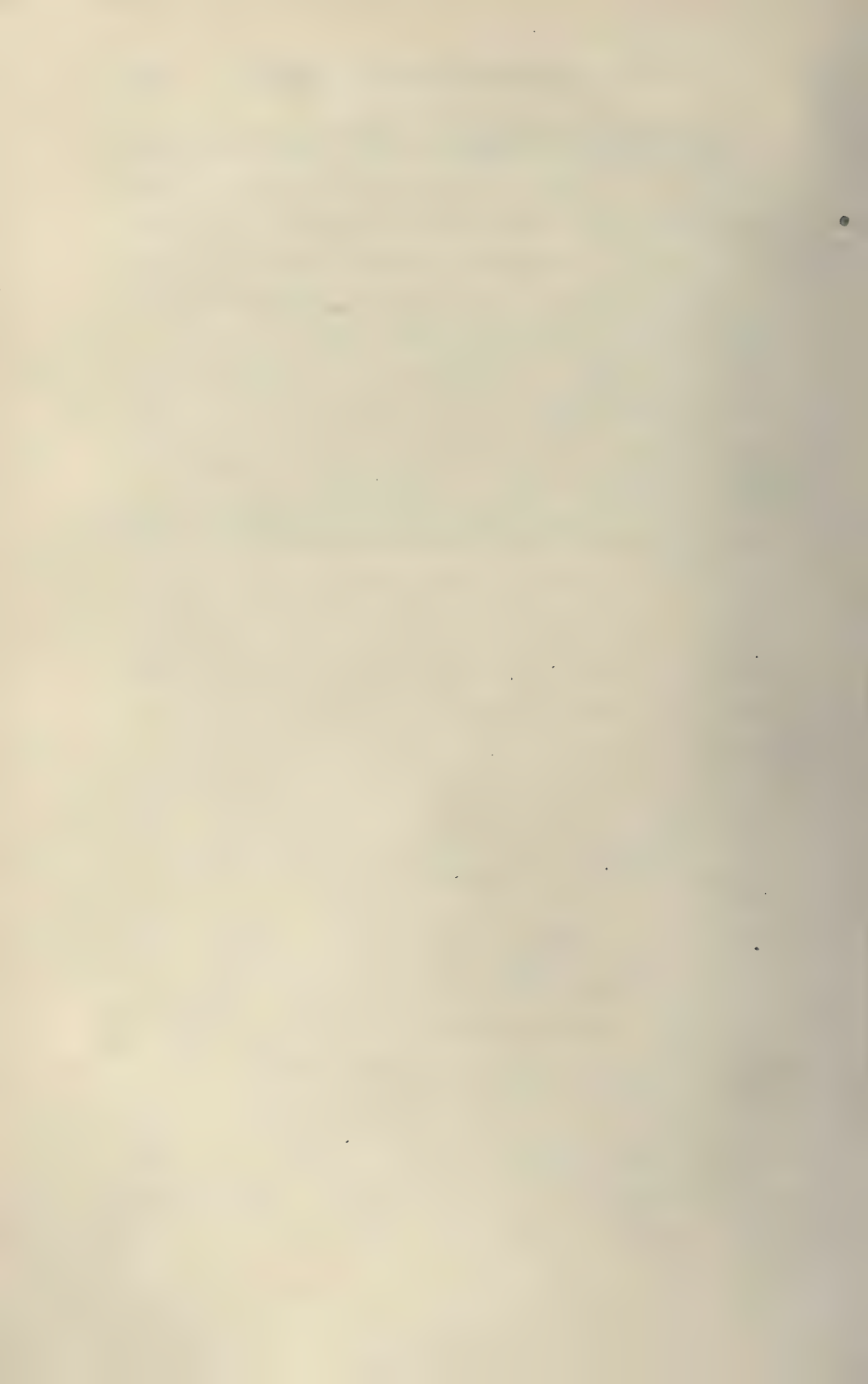
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- Parricide and Justice, The. An Historical Sketch. *Charles Green Cumston*. 16 Green Bag 578.
- Partnerships and Partners, Bankrupt, Distribution of Assets of. See *supra*, under Bankrupt.
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- Perpetuities, The Rule Against. *Anon.* A brief review of the authorities. 27 L. Stud. J. 28.
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- Personal Liberty, The Right of the Subject to, in English Law. *S. P. J. Merlin*. Tracing the growth of the right. 29 L. Mag. & Rev. 266.
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- Physician as an Expert, The. See *supra*, under Expert.
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- Police Power, Relation of Free Speech and Free Press to. See *supra*, under Free Speech.
- "Police Power," The Term. *J. M. Blainey, Jr.* 59 Cent. L. J. 486.
- Polygamy, Is, Permitted by the Laws of Illinois? See *supra*, under Illinois.
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- President, Constitutional Powers of the. *Charles A. Gardiner*. 28 N. J. L. J. 41.
- Presidential Succession Act of 1866, The. *Charles S. Hamlin*. 18 HARV. L. REV. 182.
- Presumption of Innocence in Criminal Cases to be Weighed as Evidence in the Case, Is? See *supra*, under Evidence.
- Presumptions and Burden of Proof in Actions against Carriers for Injury to Passengers and Damage to Freight. See *supra*, under Burden of Proof.
- Presumptions of Death and of Survivorship and Proof thereof. *S. S. Merrill*. 59 Cent. L. J. 464.
- Principal's Liability for Acts of his Agent, A. See *supra*, under Agent.
- Privacy, The Right of, and its Relation to the Law of Libel. See *supra*, under Libel.
- Prize, The Right of a Belligerent to Destroy a Captured. See *supra*, under Belligerent.
- Probate Proceedings in Massachusetts, The Rights of a Mesne Attaching Creditor in. See *supra*, under Attaching Creditor.
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- Process, Inter-State Service of. *Paris Nesbit*. Discussing provisions of the federal Constitution of Australia. 1 Commonwealth L. Rev. 203.
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- Public Law and Private Law. *A. A. Mitchell*. 17 Jurid. Rev. 30.
- Public Officers, Removal of, from Office for Cause. *Alonzo H. Tuttle*. 3 Mich. L. Rev. 290, 341.
- Public Utilities, The Control of. *William H. Bailly*. Discussing the regulation of rates by a city council under authority delegated by the Legislature. 12 Am. Law. 444.
- Public Waterways, National Control of the Pollution of. See *supra*, under National Control.
- Quasi-Public Corporations, Public Regulation of. *Henry H. Ingersoll*. Showing that reasonable control of such corporations is legal and proper, and contrasting the Dartmouth College case with *Munn v. Illinois*. 14 Yale L. J. 255.
- Real Property as Modified in this Country, The Old Law of. *George H. Smith*. "A commentary on Blackstone's exposition of the doctrine of real property, with a view of showing its relation to the existing law" in this country. 39 Am. L. Rev. 1.
- Reasonable Time, Basis of. *Frank E. Hodgins*. Holding that reasonable time must be treated principally from the point of view of the obligee. 41 Can. L. J. 305.
- Receiver Appointed by a Federal Court, Has a State Court Jurisdiction to Issue an Injunction against a? See *supra*, under Injunction.
- Receivers, Federal, Act of Congress Permitting Suits against. Injunctions from State Courts. *W. A. Coutts*. Maintaining that injunctions from State courts should be allowed on the ground that otherwise the Act would be negative and receivers would be given autocratic power. 39 Am. L. Rev. 59.
- Receiverships, Ancillary, in Bankruptcy. See *supra*, under Ancillary Receiverships.
- Receivers, The Rule Forbidding Suits against, without Leave, as Applied to Receivers Managing Railroad and Like Corporations. *W. A. Coutts*. A protest against the injustice worked by the rule and its tendency to despotism. 38 Am. L. Rev. 516.
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- Releases, Avoidance of, in Personal Injury Cases. See *supra*, under Personal Injury.
- Remission of Performance. See *supra*, under Performance.
- Remoteness of Contingent Remainders. See *supra*, under Contingent Remainders.
- Removal of Causes, Right of, on Behalf of Non-Resident Master Defendant. See *supra*, under Master Defendant.
- Repair of Footpaths and Stiles, The. See *supra*, under Footpaths and Stiles.
- Res Adjudicata, Illogical Trend in. *Sam'l C. Williams*. A protest against the English view that two separate actions may be maintained for injury to person and property from the same wrongful act. 59 Cent. L. J. 244.
- Rescission by Parol Agreement. *Samuel Williston*. 4 Columbia L. Rev. 455. See p. 236.
- Rescuers, Compensation to: A Question of Contributory Negligence. See *supra*, under Compensation.
- Res Judicata between Co-Defendants. See *supra*, under Co-Defendants.
- Restraint of Trade Doctrine, Problems of. *Anon.* 49 Sol. J. 28, 49.
- Revocation, The Partial, of a Will by Obliteration. *Anon.* 9 L. Notes (N. Y.) 5. See p. 627.
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- Rhode Island, The Development of the Judicial System in. *Amasa M. Eaton*. 14 Yale L. J. 148.
- Riparian Rights, Tide-Flowed Lands and, in the United States. *William R. Tillinghast*. 18 HARV. L. REV. 341.
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- Roman Law, The Old, and a Modern American Code. *Joseph H. Drake*. A comparison of the recent Porto Rican Code with the Spanish Civil Code formerly in force. 3 Mich. L. Rev. 108, 185.
- Roman Legal History, Problems of. *Munroe Smith*. Comparing the development of the common law with that of the Roman law. 4 Columbia L. Rev. 523.

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- Russo-Japonaise, La Guerre, et le Droit International. See *supra*, under Droit International.
- Safety Deposit Companies, The Liability of. *Anon.* Calling attention to the duty of safety deposit companies to resist illegal process in behalf of their bailors. 29 Natl. Corp. Rep. 202.
- Sale of Part of a Mass, The. *O. S. Bryant.* Discussing the possibility of title passing before separation, and concluding that the buyer can become a tenant in common if the parties so intend. 60 Cent. L. J. 4.
- Sales C. O. D., The Locus of. *Charles Noble Gregory.* 4 Columbia L. Rev. 541. See p. 320.
- Sales, Conditional. See *supra*, under Conditional Sales.
- Sales, Doctrine of *Lis Pendens* as applied in India, and its Application to. See *supra*, under *Lis Pendens*.
- Sale, Warranty in the English Law of. II. *Richard Brown.* 26 Jurid. Rev. 406.
- Sales under Deeds of Trust. *E. R. F. Wells.* Discussing the rights of *bona fide* purchasers at unauthorized sales. 10 Va. L. Reg. 491.
- Scientific School of Legal Thought. See *supra*, under Legal Thought.
- Scottish Church Case, The. *James Ferguson.* Discussing the recent case before the House of Lords. 16 Jurid. Rev. 347.
- Scots Law, The Sources of. *Will. C. Smith.* 16 Jurid. Rev. 375.
- Seizures, The Recent Russian, and the Sinking of the "Knight Commander." *Blackburn Esterline.* 38 Am. L. Rev. 662.
- Senate, The Power of the, to Amend a Treaty. *B. M. Thompson.* 3 Mich. L. Rev. 427. See p. 628.
- Servant, Liability of a Master to Third Persons for the Negligence of a Stranger Assisting his. See *supra*, under Master.
- Servants, Domestic. *Geo. S. Holmestead.* Discussing how far English law that a general hiring is for a year terminable at a month's notice is applicable to Canada. 24 Can. L. T. 125.
- Service of Process, Inter-State. See *supra*, under Process.
- Settlements, Compound. *Anon.* Discussing whether on a sale by a tenant for life (where there has been a settlement, a disentailing assurance, and a resettlement) it is necessary to appoint trustees of the compound settlement, as the only persons who can give a proper discharge for the purchase money. 26 L. Stud. J. 193.
- Sewerage, Municipal Liability for Injuries Resulting from Defective and Inadequate. See *supra*, under Municipal Liability for Injuries Resulting from Defective and Inadequate Sewerage.
- Smritis, Adjective Law of the. (The Hindu Law of Procedure.) *J. B. Gharpure.* 7 Bombay L. Rep. 2.
- South Africa, Law of Banking in. See *supra*, under Banking.
- South African Judgments in England, Enforcement of. See *supra*, under Judgments.
- Sovereign Litigants. See *supra*, under Litigants.
- Sovereign States, Nature and Interrelation of. *Eugene Stevenson.* 38 Am. L. Rev. 551.
- Specific Performance of Contracts to Make Testamentary Dispositions, The. *Glenda Burke Slaymaker.* Showing when and in whose favor equity will interfere. 60 Cent. L. J. 264.
- Stare Decisis, The Doctrine of. *Edward B. Whitney.* 3 Mich. L. Rev. 89. See p. 318.
- State, Limitations of the Power of a, under a Reserved Right to Amend or Repeal Charters of Incorporation. *Horace Stern.* 53 Am. L. Reg. 1, 73, 145. See p. 549.
- State, The Crown as Representing the. See *supra*, under Crown.
- Stock, Forged Transfers of. See *supra*, under Forged Transfers.
- Stockholders' and Directors' Liability, Enforcement of, Abroad. See *supra*, under Directors.
- Stock, What Constitutes a Complete Transfer of, as against Third Parties? *Romney L. Wiltson.* 59 Cent. L. J. 448. See p. 320.
- Stocks and Produce, Time Bargains in. *Ernest J. Schuster.* "An enquiry into the rules under which speculative bargains in stocks and produce have been treated as gaming or wagering transactions under the laws of different countries." 6 J. Soc. Comp. Leg. N. s. 121.
- Subjects Abroad, State Protection of. See *supra*, under State Protection.
- Subrogation. *K. S. Ramaswami Sastry.* A discussion of the law of India as to subrogation by operation of law. 3 Madras Leg. Comp. 39.
- Subscriptions and Contributions to Charitable Enterprises. See *supra*, under Charitable Enterprises.

- Suicidal Declarations in Homicide Cases. See *supra*, under Homicide Cases.
- Sunday Laws, Should the, of our Country, be Changed to Meet the Demands of our Cosmopolitan Population? *Irving E. Campbell*. Answering the question in the negative. 10 Va. L. Reg. 682.
- Supreme Court Act, Proposed Amendments to. *E. R. Cameron*. 3 Can. L. Rev. 377, 403.
- Suretyship from the Standpoint of Comparative Jurisprudence. See *supra*, under Jurisprudence.
- Surrender. *Herbert Thorndike Tiffany*. A full treatment of the subject. 3 Mich. L. Rev. 18.
- Survivorship, Presumptions of Death and of, and Proof thereof. See *supra*, under Presumptions.
- Swedish Lawbook of 1734, The: an early Germanic Codification. *Wilhelm Chydenius*. Discussing the provisions of the code on which is based the civil law of Sweden. 20 L. Quar. Rev. 377.
- Swedish Law Reform. *Seymour D. Thompson*. A review of a recent work by a Swedish author. 38 Am. L. Rev. 388, 674.
- Telegraph Companies, Liability of, for Negligence in the Transmission and Delivery of Messages. See *supra*, under Negligence.
- Tenure, Land, in the Isle of Man. *G. A. Ring*. 30 L. Mag. & Rev. 129.
- Testamentary Dispositions, The Specific Performance of Contracts to Make. See *supra*, under Specific Performance.
- Tide-Flowed Lands and Riparian Rights in the United States. See *supra*, under Riparian Rights.
- Time Bargains in Stocks and Produce. See *supra*, under Stocks.
- Tort, Actions of, The Plaintiff's Illegal Act as a Defense in. See *supra*, under Illegal Act.
- Tort Claims, Provability of, in Bankruptcy. See *supra*, under Bankruptcy.
- Tort, How far an Act may be, because of the Wrongful Motive of the Actor. See *supra*, under Motive.
- Tort Liability for Mental Disturbance and Nervous Shock. See *supra*, under Nervous Shock.
- Torts, Actions against the Commonwealth for. See *supra*, under Commonwealth.
- Torts of an Independent Contractor, Liability of an Employer for the. See *supra*, under Independent Contractor.
- Torts, or Wrongs, The Responsibility of a Child for its. *Theodore Sutro*. 38 Am. L. Rev. 371.
- Transfer of Stock, What Constitutes a Complete, as against Third Persons. See *supra*, under Stock.
- Transfers of Stock, Forged. See *supra*, under Forged Transfers.
- Transvaal, Liquidation of Companies in the. See *supra*, under Companies.
- Transvaal, The Gold Law Proposed for the. See *supra*, under Gold Law.
- Treasure Trove, The Recent Case of. *Robert Munro*. Commenting upon Attorney-General *v.* Trustees of British Museum, 19 Times L. Rep. 555. 59 Cent. L. J. 65.
- Treaty, The Power of the Senate to Amend a. See *supra*, under Senate.
- Trial by Jury and Double Jeopardy in the Philippines. See *supra*, under Jeopardy.
- Trover and Conversion, Observations on. *John W. Salmond*. 21 L. Quar. Rev. 43. See p. 402.
- Trusts, Consolidations or. See *supra*, under Consolidations.
- Trusts Contrary to the Policy of the Law. *A. H. Marsh*. An enumeration of the various instances of invalid trusts. 24 Can. L. T. 395.
- Trusts, The New, and the Old Common Law. *Ditlew M. Frederiksen*. Arguing that the old common law relating to monopoly should be applied to-day irrespective of combination. 3 Mich. L. Rev. 119.
- Union Shop, The Closed Market, the, and the Common Law. See *supra*, under Closed Market.
- Value of Real or Personal Property, When and in what Cases will a Representation as to the, be Sufficient to Predicate an Action for Fraud? See *supra*, under Fraud.
- Vaccination, Compulsory. See *supra*, under Compulsory Vaccination.
- Venezuelan Arbitration, The, Once More: Facts and Law. See *supra*, under Arbitration.
- Virginia, Civil Death in. See *supra*, under Civil Death.
- Virginia State Corporation Commission, The. See *supra*, under Corporation.
- "Volenti Non Fit Injuria." *N. G. L. Child*. An examination of the application of this maxim to the law of negligence. 17 Jurid. Rev. 43.
- Wagering Contracts. *Krishnalal Mohaulal Jhaveri*. Discussing the Indian law on the subject. 6 Bombay L. Rev. 153.
- Wagers, Loans for the Making or Payment of. See *supra*, under Loans.

- Waiver in Insurance Cases. See *supra*, under Insurance.
- Waiver, The Doctrine of. *Colin P. Campbell*. Laying down a general rule, and contending that a waiver requires a consideration or facts equivalent to an estoppel to support it. 3 Mich. L. Rev. 9.
- Warehouse Receipts, Fraudulent, and Bankers' Rights thereunder. *Chas. M. Holt*. Discussing the subject under the Quebec Civil Code. 4 Can. L. Rev. 107.
- Warehouse Receipts, Practical Suggestions on Codifying the Law of. *Francis B. James*. 3 Mich. L. Rev. 382.
- Warfare, Legitimate and Illegitimate Modes of. *James Beresford Allay*. 6 J. Soc. Comp. Leg. N. S. 10.
- Warranty Deed, When and in what Cases Parol Evidence will be Admitted to Show the Real Consideration for? See *supra*, under Parol Evidence.
- Warranty in the English Law of Sale. See *supra*, under Sale.
- Warranty of Authority, Implied. See *supra*, under Authority.
- War, Wireless Telegraphy in. *T. S. Woolsey*. 14 Yale L. J. 247. See p. 550.
- Water Companies, Liability of, for Fire Losses. See *supra*, under Fire Losses.
- Webster, Daniel, Constitutional Law of the United States as Moulded by. See *supra*, under Constitutional Law.
- Wife Testifying against Husband's Paramour in Adultery Cases. See *supra*, under Adultery.
- Will, The Partial Revocation of a, by Obliteration. See *supra*, under Revocation.
- Winding up Orders, Recent Cases as to. *C. S. MacInnes*. 40 Can. L. J. 726.
- Witnesses, Impeachment of. See *supra*, under Impeachment.
- Workmen's Compensation, The Report of the Departmental Committee on. Part I. *Alex. Moncreiff*. Review and criticism of the report of the committee appointed to consider amendments to the Workman's Compensation Act of 1897. 16 Jurid. Rev. 393.



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EQUITABLE CONVERSION.

THE word "conversion" (*conversio*) is derived immediately from the Latin verb *convertere*, which is in turn compounded of the prefix *con-* and *vertere*. *Vertere* means literally to turn or turn round, and, like our verb "turn," it is both transitive and intransitive. As a transitive verb, however, it often means also to change the nature or form of a thing, and it is used in this sense in a great variety of connections; and, when so used, it is synonymous with *mutare*. So, too, our transitive verbs "turn" and "change" are often used synonymously.

The compound verb *convertere*, especially when used transitively, has practically the same meaning as the simple verb, the prefix having little, if any, other effect than that of adding emphasis to the simple verb.

The simple verb *vertere*, as well as most of its derivatives,¹ has been wholly rejected by us, but its numerous compounds, in their transitive signification, and their derivatives have not only been generally adopted, but are in constant use, and full of life and vigor; and this is true of *convertere* and *conversio*. The latter is a verbal noun or noun of action, *i. e.*, it is the name given to the act or action expressed by the verb *convertere*. Thus, when the verb means to turn or turn round, the noun means the act or action of turning or turning round. For example, in logic, a proposition is

¹ Verse, versatile, versatility, and version are exceptions.

said to be converted when its terms are transposed, so that its subject becomes its predicate, and its predicate becomes its subject; and the act of thus transposing the terms of a given proposition is called the conversion of that proposition. Hence also the converse of a given proposition is the same proposition converted, *i. e.*, the same proposition with its terms transposed. So, too, whenever the verb means to change the form or nature of a thing, the act of making the change is called a conversion. Such a conversion may be made in two ways, one of which may be termed direct, the other indirect. It may be made directly, either by the operation of natural laws, as when water is converted into ice by freezing weather, or by artificial means, as when cotton, flax, or wool is converted into cloth by the processes of spinning and weaving, and when iron is converted into steel by any of the processes employed for that purpose. So also land may be converted directly into a chattel by the physical act of severing a portion of the earth from the general mass, as where ore is dug from a mine. A conversion may be made indirectly by exchanging one thing for another, as when land is converted into money by selling the land, and thus receiving money in exchange for it, or (what is still more indirect) when land is converted into railway shares by selling the land for money, and then investing the money in railway shares.

Of these two kinds of conversion, it is chiefly of the indirect that the law takes cognizance.

It is obvious that every exchange of one thing for another is a bilateral or two-sided transaction, as every exchange of money for land (for example) is also an exchange of land for money. Moreover, such an exchange commonly has its origin in a bilateral or mutual contract, between the two parties to the exchange, to make such exchange.

Sometimes, however, the contract is only unilateral, *i. e.*, one of the parties only binds himself to make the exchange, the other having an option to make it or not, until it is actually made.¹ An exchange may also be made without any previous contract of any kind, *i. e.*, the parties may arrange together the terms on which they will make the exchange, and then make it without either one's binding himself to make it. It is in this way that a tradesman commonly sells goods by retail over the counter. So when the owner of property creates a right in another person to have prop-

¹ See *infra*, p. 10.

erty sold to satisfy a lien or charge thereon, but the sale can be made only under a decree of a court of equity, it is necessarily made without any previous contract. To be sure, there are commonly all the forms of a sale by auction, but these forms do not create a contract. What the buyer relies upon is the good faith of the court, and the court relies upon its power to compel the buyer to perform his promise, although the latter is not legally binding.

For the present purpose, however, it may be assumed that every exchange is preceded by a bilateral contract to make the exchange. In order, however, that such a contract may result in an actual exchange, it is plain that one of the parties to the contract must, at the time of making the exchange, be the owner of one of the things to be exchanged, and the other must be the owner of the other, or, if either of them be not such owner, he must be fully authorized by the owner to make the exchange. The owner of a thing may authorize another person to exchange it for something else, either by conferring upon him a power to make the exchange, or by vesting in him the legal title to the thing, with authority to make the exchange, and, in either case, he may confer merely an authority to make the exchange, or he may direct it to be made. It is in one of these two modes that an authority or direction is always given by a will to sell or purchase land. A mere authority to sell or purchase land, whether given by will or otherwise, has little to do with equitable conversion, while a direction by will to do either gives rise to some of the most important questions which the subject of equitable conversion involves. As, therefore, a direction given by will to sell or purchase land is always attended with two peculiarities, it is important that these peculiarities be carefully attended to. In respect to these peculiarities, moreover, there is no difference between a direction to sell or buy land and a mere authority to do so.

The first of these peculiarities is that such a direction does not take effect for any purpose whatever until the testator's death;¹ the second is that, at the moment of the testator's death, all his property devolves upon some one else, either by the effect of his will, or by operation of law, and consequently the land which a testator has directed to be sold will, at the moment of his death, descend to his heir, unless he has devised it to some one else; and

¹ *Sheddon v. Goodrich*, 18 Ves. 481; *Hooper v. Goodwin*, 18 Ves. 156.

the money with which a testator has directed land to be purchased will, at the moment of his death, devolve upon his executor for the benefit of his next of kin, unless he has bequeathed it to some one who is not his next of kin, and, in the latter case, it will devolve upon the executor for the benefit of the legatee. As, therefore, the sale or purchase of land directed by a testator cannot take place until sometime after his death, it cannot take place until the land to be sold, or the money with which land is to be purchased, has completely changed ownership in the manner just stated. When, therefore, a testator directs a sale or purchase of land after his death, he directs a sale of land which will not then be his, or a purchase of land with money which will not then be his, and hence the question at once arises whether the direction is valid. Before this question can be answered intelligently the effect of such sale or purchase, if actually made, must be ascertained.

When land is exchanged for money or money for land, the first effect is that he who before owned the land becomes owner of the money instead, and that he who before owned the money becomes owner of the land instead, except so far as the money for which the land is exchanged, or the land for which the money is exchanged, is otherwise effectively disposed of, and except so far as the money for which land is exchanged goes to satisfy a charge or charges on the land. Whenever, therefore, any question arises as to who is entitled to the proceeds of a sale of land, for example, the answer generally depends upon the answer to three preliminary questions, namely, 1st, who owned the land when the sale was made; 2dly, how much, if any, of such proceeds goes to satisfy a charge or charges on the land; 3dly, how much, if any, of such proceeds is effectively disposed of by the will.

The second effect of an exchange of land for money, or of money for land, is that he who before was the owner of real estate becomes the owner of personal estate instead¹ and that he who before owned personal estate becomes the owner of real estate instead. If, therefore, he who owned the land before the exchange was made, die the next day after the exchange, the money which he has received in exchange will go to his personal representative, whereas, if he had died the day before the exchange, the land would have gone to his heir. So, if he who before owned the money die the day after the exchange is made, the land which

¹ See *Walter v. Maunde*, 19 Ves. 424.

he has received in exchange will descend to his heir, whereas if he had died the day before the exchange was made, the money would have devolved upon his personal representative. It should be added, however, that this second effect of an exchange, though it is always and necessarily produced at law, is not always produced in equity, for, if a court of equity be of opinion that either party to the exchange ought not to have made the exchange, or that justice requires that the exchange should not produce this second effect as to the money or the land given in exchange, such court may, and sometimes will, reconvert such money into land, or such land into money, in the manner to be hereafter stated, *i. e.*, treat the money, for the purposes of devolution, as if it were land, or the land as if it were money.

The effects produced by an actual exchange of land for money, as stated in the last two paragraphs, are illustrated by the following cases.

Thus, in *Flanagan v. Flanagan*,¹ where a testator devised her land to her father and brother, subject to a charge for payment of her debts, and after the testator's death the father died, and then some of the land was sold under a decree, but it turned out that none of the proceeds of the sale were needed for the payment of debts, one half of such proceeds clearly belonged to the father's heir, though the same was held to belong to his next of kin. On the father's death his one half of the land descended to his heir, and it continued to belong to him till the sale was made. If, however, the sale had been made during the father's life, his one half of the land would thereby have been actually converted into money, and such money would, upon his death, have devolved upon his executor for the benefit of his next of kin. A question was sought to be raised whether, as the sale turned out to be unnecessary, the money ought not to be reconverted by equity into land. No such question, however, was before the court, for, assuming that it would have to be answered in the affirmative, the only effect would be that the father's heir would take it as land, and whether he would take it as money or land would not be material until it devolved from him upon some one else.

So in *Ackroyd v. Smithson*,² where a testator devised land to trustees in trust to sell the same, and divide the proceeds

¹ Cited 1 Bro. C. C. 498.

² 1 Bro. C. C. 503.

among fifteen legatees, two of whom died during the testator's life, and after the testator's death the land was sold, the shares of the two deceased legatees in the proceeds of the sale clearly belonged in equity to the testator's heir, the land being his when it was sold, and the shares of the two deceased legatees being undisposed of; and the court so held, though not till after the celebrated argument of Mr. Scott (afterwards Lord Eldon) had induced Lord Thurlow to change his mind, he having announced, before Mr. Scott began his argument, that his opinion was in favor of the testator's next of kin, who claimed the shares of the two deceased legatees against the heir, and who filed the bill to enforce their claim.

Ackroyd *v.* Smithson was soon followed by Robinson *v.* Taylor,¹ where a testator devised his land to his executors in trust to sell the same, and make certain payments out of the proceeds, and pay the interest of the residue to a person named for life. The land was sold accordingly, and, on the death of the legatee for life, Lord Thurlow held that the principal of such residue went to the testator's heir, though the same was claimed by his next of kin.

So in Dixon *v.* Dawson,² where a testator devised all his land to trustees to be sold to satisfy certain charges, and the same was sold accordingly, and produced a surplus, and the sale was held to have been properly made, it was also properly held that such surplus belonged to the heir, but that, the sale having been made in his lifetime, the surplus was money in his hands, and so devolved on his personal representative.

In Wilson *v.* Coles,³ where land was directed by will to be sold, and the only valid gift of the proceeds of the sale was to the testator's wife for her life, and the testator died in 1841, leaving two co-heirs, one of whom died in 1843, and the land was sold in 1857, and the wife died in 1859, it seems clear that the heir of the deceased co-heir was entitled to the latter's one half of said proceeds, though the court gave the same to her personal representative. On the testator's death the legal title to the land passed to the devisees in trust, but the equitable title descended to the two co-heirs, on the death of one of whom her one half of the land descended to her heir, in whom it remained until the sale, when the interests of all persons concerned were converted for all

¹ 2 Bro. C. C. 589.

² 2 Sim. & S. 327.

³ 28 Beav. 216.

purposes into money. Until the death of the wife, the interests of the two co-heirs and of the heir of the deceased co-heir were of course reversionary.

If a mortgaged estate be sold by the mortgagee, under a power of sale contained in the mortgage deed, any surplus which is produced by the sale will belong to the mortgagor. Why? Because he was in equity the owner of the estate when the sale was made, the mortgage being a mere charge. If, however, the mortgagor die before the sale, still being the owner of the estate, and then the sale be made, the surplus will belong to the heir or devisee,¹ though, if he had died after the sale, it would belong to his executor.²

The real estate of a bankrupt, though its legal title passes to his assignees, still belongs in equity to the bankrupt, subject only to the lien of his creditors, so long as it remains unsold. If, therefore, it be sold by the assignees during the bankrupt's life, any surplus will belong to the latter, and, on his death, will go to his personal representative, but, if it be sold after the bankrupt's death, any surplus will belong to his heir.³

If a settled estate be subject to a mortgage which antedates the settlement, and the estate be sold to satisfy the mortgage, and produce a surplus, such surplus will belong to the persons to whom the equity of redemption belonged when the sale was made, *i. e.*, it will follow the limitations of the settlement.⁴

If settled land be taken by the state for public uses the effect will be the same as if the land had been sold to satisfy a prior charge, as the title acquired by the state will override all the limitations in the settlement, and therefore the money which the state pays for the land will be subject to all those limitations, just as the land was before the state took it.⁵

If a settled estate be sold under a power, whether the power be created by the settlement, or afterwards by private act, the sale being made with a view to reinvesting the proceeds in other land, such proceeds will, immediately upon the sale's being made, follow all the limitations of the settlement, and that too whether the

¹ *Wright v. Rose*, 2 Sim. & S. 323; *Bourne v. Bourne*, 2 Hare 35; *Gardner's Trusts*, *In re*, 1 Equity Reports, 57.

² *Mary Smith's Mortgage Account*, *In re*, 9 W. R. 799.

³ *Banks v. Scott*, 5 Madd. 493.

⁴ See *Jones v. Davies*, 8 Ch. D. 205.

⁵ *Horner's Estate*, *In re*, 5 De G. & Sm. 483.

instrument creating the power directs the proceeds of a sale to be reinvested in land or not.¹

In each of the three preceding cases, if the settlement does not exhaust the entire fee-simple in the land, the ultimate reversionary interest in the money which has been substituted for the land will vest in the person or persons in whom the ultimate reversion of the fee-simple in the land was vested when the latter was converted into money.

In *Jerny v. Preston*² by a marriage settlement, dated Oct. 4 and 5, 1751, land was limited to the intended husband for life, remainder to trustees for five hundred years, remainder, in the events which happened, to the husband in fee. The trust of the term was to raise £5000 for the intended wife on the death of the husband. The husband died in January, 1752, having devised the land to the wife for life, remainders over. Afterwards the trustees of the term sold a part of the land for the said term for the purpose of raising the £5000, and the sale produced a surplus, which was paid into court, and had there remained ever since. The wife received the income of this surplus until her death, November 18, 1791, since which time, a period of more than fifty years, the income had accumulated, and the question was to whom did the principal and accumulated income now belong, on the supposition, 1st, that it was money in equity as well as in fact, 2dly, that it was land in equity? On each supposition the total product of the sale, from the moment of its receipt by the trustees, followed the limitations in the husband's will, subject to the payment of the £5000. The five hundred year term was, in the events which happened, and subject to the payment of the £5000, held in trust for the husband, he being the owner of the reversion expectant on the termination of that term. The only effect of the term in equity was, therefore, to create a charge on the land of £5000, and though in strictness of law this charge extended only to the term, yet for all practical purposes it extended to the entire fee-simple. Indeed, a charge so created differs practically from an ordinary charge on land, created by the will of its owner, only in this, namely, that the former will bind the land even in the hands of a purchaser for value without notice, while the latter will bind it only so long as it remains in the hands of the person who created the charge, or of the person or persons claiming under him, who received the land without paying value for it or with notice of the charge. By the

¹ *Duke of Cleveland's Settled Estates, In re*, [1893] 3 Ch. 244.

² 13 Sim. 356.

husband's will, therefore, not only the legal reversion, expectant on the termination of the term, but also the equitable ownership of the term itself passed to his devisees, subject to the charge. Consequently, when the sale was made, the money produced by it belonged to the same devisees, subject to the same charge, and, when the latter was paid off, the surplus which remained still belonged to the husband's devisees. Accordingly, as the wife had, by her husband's will, a life interest in the land sold, she rightfully received the income of the surplus money during her life. On her death the ultimate remainder in fee, created by her husband's will, vested in possession, and hence the owner of that remainder then became the absolute owner of said surplus, whether it had the quality of money or land. If it had the quality of money, it henceforth devolved as money, while, if it had the quality of land, it devolved as land. The court held that it had the quality of land, whether rightly or not, I shall inquire hereafter.

If land which is exchanged for money belong to two or more co-owners, the money received in exchange will belong to them respectively in the same proportions as the land did before. If, however, the land belong (for example) to A for life, remainder to B in fee, the interest of each will be separate and distinct from that of the other, as if A owned Black Acre and B owned White Acre, and therefore, though they join in making a sale, A will be entitled to so much of the money as represents his life estate, and B will be entitled to the remainder.¹ But if the land be held by a trustee for A and B, and be sold by the trustee, he will hold the money as he held the land, namely, for A for life, and then for B absolutely.

There is one notable exception to the rule that when land is exchanged for money the money belongs to the person who owned the land when the exchange was made; for, when an ordinary bilateral contract is made for the sale and purchase of land, and, pending the contract, the vendor dies, and then the contract is performed, the land will have to be conveyed to the purchaser by the vendor's heir or devisee to whom it will have devolved on the vendor's death, and yet the money will have to be paid to the vendor's executor. Why is this? Primarily, it is because the land of a deceased person devolves upon his heir or devisee, while his personal estate, including his *choses en action*, devolves upon his executor. Consequently, when a vendor dies, pending a contract

¹ Pedder's Settlement, *In re*, 5 D. M. & G. 890.

for the sale of his land, the land will devolve on his heir or devisee, and he alone therefore can convey it to the purchaser, while the contract, in respect to the right which it confers upon the vendor as well as the obligation which it imposes upon him, devolves upon his executor, and therefore he alone is entitled to receive the money from the purchaser. Yet, if the executor attempt to enforce the contract at law, he will encounter an insuperable obstacle, for he cannot show a breach of the contract by the purchaser without showing, on his own part, ability, willingness, and an offer to convey the land on receiving the money, and that, of course, he cannot show. His only remedy, therefore, is a bill in equity for specific performance, and equity permits him to file such a bill against the purchaser, making the vendor's heir or devisee a co-defendant, and a decree is made against each defendant, namely, that the purchaser pay the money to the plaintiff on receiving a conveyance of the land, and that the heir or devisee convey the land to the purchaser on his paying the money to the plaintiff; and, though the plaintiff does not accomplish this result on the strength of his legal right alone, yet the only principle of equity which he has to invoke is the principle that the vendor's heir or devisee, not being a purchaser for value of the land, stands in the shoes of the vendor, and so must perform his contract to convey the land.

As the vendor's executor may file a bill against the vendee, making the vendor's heir or devisee a co-defendant, and have a decree as stated above, so, of course, the vendee may file a bill against the vendor's heir or devisee, making the executor a co-defendant, and have a decree that the heir or devisee convey the land to the plaintiff on his paying the money to the executor.

The foregoing exception has, however, been unwarrantably extended to a class of cases to which it is not at all applicable, namely, to cases in which an owner of land gives to another person an option of purchasing the land at a certain price and within a certain time, and dies, pending the option, and then the option is exercised and the land conveyed: for it has been held that, while the land has devolved upon the heir or devisee of the deceased, and so must be conveyed by him, yet the money must be paid to the executor.¹ In short, it has been held, as to the point now under

¹ *Lawes v. Bennett*, stated by Lord Eldon in *Ripley v. Waterworth*, 7 Ves. 436, and afterwards reported in 1 Cox 167; *Townley v. Bedwell*, 14 Ves. 591; *Collingwood v.*

consideration, that there is no difference between an unilateral contract giving an option of purchasing land, and the ordinary bilateral contract for the sale and purchase of land. There is, however, this very important and radical difference between these two species of contract, namely, that in the latter the vendor is not only under an obligation, but also has a correlative right, his obligation being to vest in the purchaser a good title to the land on receiving the purchase money, and his right being to receive the purchase money on performing his obligation, while in the former the giver of the option, though he is under an obligation, has no right whatever. There is this difference, moreover, between the obligations incurred in the two cases, namely, that the obligation of a vendor is generally subject to no condition, except that of a concurrent performance by the purchaser of the obligation resting on him (the performance of which obligation is a condition implied by law),¹ while the obligation incurred by the giver of an option is subject to the condition of the concurrent payment of the purchase money, — which is a condition pure and simple, and which is either express or implied in fact.²

A notion seems to have prevailed that, when an option of purchasing land has been given, the receiver of the option becomes bound as soon as he decides to avail himself of the option, and notifies the giver of the option that he has so decided. This, however, is assuming that an option, instead of being an unilateral contract, is an offer to make a bilateral contract, and that the giving of notice as above is an acceptance of the offer, and so completes the contemplated bilateral contract. An option, however, being an unilateral contract, can never become a bilateral contract,

Row, 26 L. J., Chan. 649; *Weeding v. Weeding*, 1 J. & H. 424; *Isaacs, In re*, [1894] 3 Ch. 506.

In *Drant v. Vause*, 1 Y. & Coll. C. C. 580, *Emuss v. Smith*, 2 De G. & Sm. 122, *Walker, Ex parte*, 1 Dr. 508, and *Edwards v. West*, 7 Ch. D. 858, the court declined to follow *Lawes v. Bennett*, holding it not to be applicable, though it seems very doubtful whether the decision in either of them was consistent with *Lawes v. Bennett*. In *In re Adams and the Kensington Vestry*, 27 Ch. D. 394, the court also declined to follow *Lawes v. Bennett*, though without disapproving of it, and in truth *Lawes v. Bennett* was not there an authority for either party, the question before the court being a wholly different one, namely, whether the right created by a contract giving an option devolves in equity, on the death of its owner, upon his heir or personal representative, — a question which will be considered hereafter.

¹ See my Summary of Contracts, s. 32. I shall not apologize to the reader for referring him to this little book while discussing the subject of "Options."

² See *idem*.

and therefore differs entirely from an offer,¹ and here it is assumed that it is an "option," and not an "offer," that we are dealing with. An option, then, being a conditional unilateral contract, a notice by the receiver of the option that he avails himself of it is, if it have any legal significance, the performance of a condition pure and simple. Moreover, while the giver of an option may with propriety require such a notice to be given, he will not be entitled to have it given unless he expressly require it by the terms of his contract, *i. e.*, the giving of such a notice can be only an express condition;² nor can it be the only condition of such a contract, for, if it were, its performance would enable the receiver of the option, while himself remaining perfectly free, to compel the giver of the option to convey the land, not only without receiving the purchase money, but without having any remedy for recovering it. The concurrent payment of the money must, therefore, be a further condition, and that too by a necessary implication of fact, if it be not express.³

When, therefore, an option is exercised after the death of the person giving it, how can his executor obtain the money which the person exercising the option must pay in order to get the land?

¹ My Summary of Contracts, written twenty-five years ago, contains, at section 179, the following passage: "Care must be taken to observe a distinction which is apt to be lost sight of. There is no doubt that A may make a binding promise to sell certain property to B on certain terms, while B is left perfectly free to buy the property or not; and such a promise will, in most respects, confer the same rights upon B as if he had made a counter-promise to buy. But such a case differs materially from that of a mere offer to sell property. It is not an offer contemplating a bilateral contract, but it is a complete unilateral contract. All that remains to be done is for B to perform the condition of the promise by paying the price, and for A to perform the promise. The contract will remain unilateral until it is performed, or otherwise comes to an end. Of course A and B together can at any moment substitute for it a bilateral contract, but they cannot strictly convert it into a bilateral contract; still less can this be done by an act of B alone. Even if B should subsequently make a binding promise to buy the property, the result would not be a bilateral contract, but two unilateral contracts; the two promises would not be the consideration of each other, and each would have to be supported by some other sufficient consideration." In *Emuss v. Smith*, 2 De G. & Sim. 722, 735, Knight Bruce, V. C., said: "How this case would have stood if the contract of 1838 had been an absolute or ordinary contract of sale, binding one party to sell and the other to buy, and not, as it was, a contract resting merely in the option of the person with whom the testator entered into the contract, it remaining uncertain, during the whole of the testator's life, whether the purchase would ever take place or not, I need not say."

² See *idem*, s. 32.

³ *Ibid.* See also *Weeding v. Weeding*, 1 J. & H. 424, and in *In re Adams and the Kensington Vestry*, 27 Ch. D. 394, in each of which the payment of the money was made an express condition.

The deceased had no rights whatever under the contract, nor has his executor. The person exercising the option pays the money voluntarily, and his only inducement to pay it is his desire to obtain the land. Why then should he pay it to the executor of the deceased? Such a payment will not help him to get the land. Moreover, if he pays it to the executor, he cannot pay it to any one else, and yet he must pay it to some one else in order to get the land, namely, to the heir or devisee of the deceased. Why? Because the latter owns the land, and can alone convey it. Will equity compel him to convey it on receiving the money? Yes. Why? Because, having received it from the deceased without paying any value for it, equity regards him as standing in the shoes of the deceased, and as subject, therefore, to the same obligation in equity to convey the land to which the deceased was subject at law. Can equity compel the heir or devisee to convey the land without payment to him of the money? No. Why not? Because it could not have compelled the deceased to convey it without payment of the money to him, and to compel the heir or devisee to do so would be to hold him to be under a greater obligation in equity than the deceased was under at law, *i. e.*, to be bound absolutely, while the deceased was bound only conditionally.

How is it then that the courts have held that the executor, and not the heir or devisee, is the person who is entitled to the money? The first answer is that the courts have never so held until the contract has been carried completely into execution by the payment of the money to the heir or devisee, and the conveyance of the land by him. The second answer is that, when the contract has thus been carried completely into execution, the courts have held that the executor is entitled to receive the money from the heir or devisee. Upon what theory is this? It can be only upon the theory that the money, when paid in exchange for the land, is a part of the personal estate of the deceased, and that can be only upon the theory that the exercise of the option relates back to the time when the contract giving the option was made; and accordingly it is upon that ground that the courts have generally sought to vindicate their decisions. Nothing, however, could show more conclusively that these decisions have no solid ground to rest upon than the fact that they can be supported by no better argument than this. The doctrine of relation is a legal fiction, and a court can be justified in proceeding upon a fiction only when it is necessary for the purposes of justice, or at least when the fiction is

promotive of justice. *In fictione juris semper aequitas existit*.¹ If, however, the decisions in question are to be taken as representing the doctrine, this maxim ought to be so modified as to read, "*In fictione juris semper iniquitas existit*"; for the reader will observe that, up to the time when the money is paid and the land conveyed, the executor has no right whatever either to the money or the land, and yet the moment that the money is exchanged for the land, and the land for the money, the executor, though not a party to the exchange, nor in any way concerned with it, is, according to these decisions, entitled to the money, not merely in equity, but at law as well, for, as to such a right, there is no difference between law and equity.²

It may be added that the doctrine of relation involved in these decisions proves too much, for it proves that, if a rent be granted in fee-simple out of certain land subject to a perpetual right in the owner of the land for the time being to purchase the rent on certain terms, and, at the end of five hundred years, such purchase be made, the money will belong to the personal representative of him who granted the rent.³

It is commonly assumed that the effects produced by an exchange of money for land are the same, *mutatis mutandis*, as those produced by an exchange of land for money, and that the effects would be absolutely the same, but for the fact that, when a person dies intestate, his money and land devolve upon different persons. In truth, however, there are other differences between money and land, in respect to their devolution, which are of much greater legal importance than the fact that they devolve upon different persons. It is often assumed, also, that the heir and next of kin of a person who dies intestate are true analogues of each other, while, in truth, there is no person who occupies in respect to personal estate the position occupied by the heir in respect to land. When a person dies intestate as to his land, the same descends instantly and by operation of law to his heir, who becomes the owner of it absolutely and for his own benefit, while the personal property of one who dies, whether testate or intestate, instantly and by opera-

¹ See my Summary of Contracts, s. 7.

² When the option is given by will, the courts do not hold that the exercise of the option can relate back to a time prior to the testator's death. *In re Goodall*, 65 L. J., Chan. 63.

³ See *Graves's Minors*, 15 Irish Chan. 357, where a rent was granted in 1709 and redeemed in 1862.

tion of law, devolves upon his executor or administrator, who becomes the absolute owner of it both at law and in equity, though only in his official capacity, and not for his own benefit. For whose benefit, then, does he hold it? First, for the benefit of the creditors of the deceased, *i. e.*, subject to their right to have their debts paid out of it; secondly, for the benefit of the legatees of the deceased, so far as he dies testate; thirdly, for the benefit of the next of kin of the deceased, *i. e.*, the persons pointed out by the Statute of Distributions,¹ so far as he dies intestate. What are the benefits to which legatees and next of kin are entitled? First, specific legatees are entitled to receive the specific articles given to them, unless their sale shall be necessary for the payment of debts; secondly, pecuniary legatees are entitled to receive the amount of their respective legacies in money, if the assets are sufficient to pay them after creditors and specific legatees are satisfied; thirdly, the residuary legatees or next of kin, as the case may be, are entitled to be paid in money any residue which remains, and for that purpose to have all the assets turned into money. It will be seen, therefore, that no legatee or next of kin can ever become owner of any part of the personal estate of the deceased, except through his executor or administrator, and that a specific legatee alone is ever entitled to become owner of any specific part of the personal estate of the deceased. When does a specific legatee become the actual owner of the thing specifically bequeathed to him? Only when the executor or administrator delivers it to him, or assents to his receiving it, and thus relinquishes his right to sell it for the payment of debts. How does the law secure to legatees and next of kin the benefits to which they are entitled? In case of legatees, by making it the duty of executors and administrators to do whatever legatees are entitled to have done, — which duty equity will require them to perform specifically. In respect to next of kin, the Statute of Distributions imposes a similar duty, and with similar consequences. Moreover, wherever a duty is imposed upon an executor or administrator in favor of legatees and next of kin, of course a correlative right is conferred upon the legatees or next of kin, and it is by virtue of this correlative right that the performance of the duty is enforced.

Suppose, then, a testator directs his executor to invest his residuary personal estate in land, and to settle the land on certain

¹ 22 & 23 Car. II., c. 10.

persons for their lives, with remainders to their respective sons successively in tail male, and that the executor does as thus directed, the land purchased being conveyed to him in fee-simple by the seller, and then being conveyed by him according to the direction in the will. Of course, the ultimate reversion in fee-simple, not having been disposed of by the testator, will remain in the executor, and will be held by him for the benefit of the testator's next of kin. If, then, all the tenants for life die without issue, all the limitations of the settlement will be exhausted, and the executor's reversion will become a fee-simple in possession, and the executor will still hold the same for the benefit of the next of kin. What, then, will be the rights of the latter? Simply to have the land sold by the executor and its proceeds divided among them according to the Statute of Distributions. Of course, it will be open to them to make an arrangement with the executor to convey the land to them, instead of selling it, but they will have no right to require him to convey it to them. If, then, one of the next of kin die intestate at any time between the original purchase of the land by the executor and the sale of it by him, how will his right devolve? Of course, it will devolve only as personal estate, as it is only a right to receive a sum of money, and so it was held to devolve by Sir W. Page Wood, V. C. (afterwards Lord Chancellor Hatherley), when the question arose before him, and for the first time, in *Reynolds v. Godlee*.¹ His decision was, however, afterwards overruled by Sir G. Jessel, M. R.,² who held that the land itself belonged to

¹ John. 536, 582.

² *Curteis v. Wormald*, 10 Ch. D. 172. The judgment of Sir G. Jessel in this case, the facts of which are substantially those supposed in the text, contains one or two things which require to be noticed. According to the report the testator directed his trustees, and not his executors, though the same persons were both executors and trustees, to invest his residuary personal estate in land, and upon this Sir G. Jessel remarks: (174) "A testator directed his trustees — for, although the same persons may have been appointed executors, they are for this purpose trustees and trustees only — to lay out his residuary personal estate in the purchase of real estate." He afterwards says: (175) "The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law under the Statute of Distributions, as trustee for the next of kin, and no one else." These statements are surprising. If the will had disposed of personal estate only, there would have been no possible reason for appointing trustees, nor is there the slightest reason to suppose that any would have been appointed. The will began, however, with devising the testator's real estate in strict settlement, and, having been made in 1818, it doubtless contained the usual limitations to trustees to support contingent remainders; and the fact of there being trustees is thus accounted for. The use of the word trustees by the testator, however, in connection with his personal

the next of kin in equity, and hence devolved as land, and his decision was affirmed by the Court of Appeal in Chancery. I am, however, bound to express the opinion that Sir W. Page Wood was right, and that Sir G. Jessel and the Court of Appeal in Chancery were wrong.

There is, however, one argument in favor of the decision in *Curteis v. Wormald* which, as it was not alluded to by Sir G.

estate was evidently a mistake, and should have been disregarded. The testator made no bequest of his personal estate to the trustees, nor could he have bequeathed it to the trustees as such, as it would already be in them in another character by operation of law from the moment of the testator's death, and must remain in them in that character until it was fully administered, and it had not been fully administered when the case was decided. How Sir G. Jessel gets it into the hands of the trustees as legatees, he does not explain. His object, however, in seeking to accomplish that result is plain enough, for he seeks to show that, when the executors have paid over the residue of the personal estate to themselves as trustees, they will have completed their administration of the estate and become *functi officio*, and that henceforth they will hold first the money and then the land as trustees for the next of kin, subject of course to the limitations of the settlement which the will directs. The administration of an estate is not completed, however, until the property has all gone into the hands of persons who own it absolutely. If, therefore, a part of the estate goes into the hands of a person who has a limited interest in it only, the consequence will be that the ultimate reversion will still be a part of the testator's estate unadministered, and will therefore be vested in his executor as such, and consequently, when that limited interest expires, the property must return to the possession of the executor in order that he may complete his administration of it. Even assuming, therefore, that Sir G. Jessel succeeded in getting the residue of the personal estate out of the hands of the executors as such and into the hands of the same persons as trustees, and that the latter acquired such residue absolutely at law, the result would be only a useless circuitry, as there would be an immediate resulting trust of such residue to the executors, subject only to the limitations of the settlement. In short, the trustees in their character of trustees cannot be trustees for the next of kin, for they must be trustees for themselves as executors. (For this absurd phraseology Sir G. Jessel is himself responsible.) There is, however, another objection to the trust which Sir G. Jessel seeks to establish, namely, that the next of kin cannot be the *cestuis que trust* in such a trust. By next of kin Sir G. Jessel means (and properly so) next of kin as such, *i. e.*, as creatures of the Statute of Distributions, and next of kin in that character have only such rights as the Statute gives them, and the only right which the Statute gives them is the right to require the personal representative of the deceased to perform the duties which the Statute imposes upon him as such.

The Statute of Distributions was passed at a time when the administration of the estates of deceased persons was within the exclusive jurisdiction of the spiritual courts, the jurisdiction now and for a long time past exercised by courts of equity not having been assumed till a later period. Accordingly the Statute makes not the slightest reference to courts of equity nor to the subject of trusts, — a subject as entirely foreign to the spiritual courts as it is to courts of common law. So far as regards the matters now under consideration, the Statute simply lays its commands on the personal representative of the deceased and directs the spiritual courts to see that those commands are obeyed.

Jessel nor by the judges of the Court of Appeal, I have not yet mentioned, but which it is proper that I should now state and briefly consider.

Prior to the Statute of Distributions, executors owed no duty except to legatees, and if anything remained after debts and legacies were paid the executor was entitled to retain it for his own benefit. Nor was any change made in that respect by the Statute of Distributions, as that Statute applied only to administrators. After courts of equity, however, had assumed that jurisdiction over the estates of deceased persons which they have ever since exercised, they soon became impressed with the injustice of permitting executors to reap the benefit of every failure by their testators to make an effective disposition of their residuary personal estate, and felt themselves authorized to follow the analogy of the Statute to the extent of requiring executors to distribute among the testator's next of kin any residue of his personal estate which was not effectively disposed of, whenever they could find in the will evidence to show that the testator did not intend any such residue to go to the executor for his own benefit; and, finally, in 1830, by the Statute of 11 Geo. IV. & 1 Wm. IV., c. 40, the burden of proof was shifted from the next of kin to the executor, the Statute declaring that the next of kin shall be entitled to any residue of the personal estate which is undisposed of, unless it shall appear by the will that the executor was intended to take such residue beneficially. While, however, the courts of equity followed the analogy of the Statute in the relief which they gave, they acted inconsistently with the Statute in their mode of giving such relief, for, instead of simply directing executors to distribute such residue among the next of kin, they declared them to be trustees of such residue for the next of kin, and 11 Geo. IV. & 1 Wm. IV., c. 40, followed in the footsteps of the courts.

Does then this Statute prove that in *Curteis v. Wormald* the executors ever held the land purchased by them, or the ultimate reversion therein, not as executors, but as trustees? For, if it does, and if, during the time that they so held it, one or more of the persons died who were then entitled to a share of the testator's residuary personal estate, it will follow that any person so dying was at the time of his death a *cestui que trust* of such land, and that his interest as such descended to his heirs, unless the deceased had disposed of it otherwise by his will. It is submitted, however, that the question just put must be answered in the negative.

1. There is no pretense for saying that the executors held the land in question in any different character from that in which they held all the residuary personal estate. 2. The Statute must be so construed, if possible, as not to make any change in the *office* of executor. 3. It must therefore be so construed, if possible, as not to change the character in which an executor holds the residuary personal estate at an earlier date than that at which the testator himself could have directed such a change to be made. 4. A testator cannot direct that his executor shall cease to hold his residuary personal estate as executor, and thenceforth shall hold the same as trustee, until the estate shall have been fully administered. 5. An estate is not fully administered until all the specific property has been converted into money, except such articles as have been specifically bequeathed or such, if any, as have been taken by the residuary legatees or next of kin by mutual arrangement between them and the executor. 6. The purposes of the Statute will be entirely satisfied by holding that an executor ceases to hold an undisposed of residue as executor when it has all been converted into money, its amount precisely ascertained, and when it has consequently become his duty to pay it over to the next of kin.

It may be added that the relation of trustee and *cestui que trust* can never exist between an executor as such and any other person or persons whatever, and therefore that the next of kin in *Curteis v. Wormald* were not *cestuis que trust* of the land in question, if such land was still held by the executors as such. It may also be added that a trustee as such never has power in equity to sell land, unless such power be actually conferred upon him by the creator of the trust; and therefore, according to the decision in *Curteis v. Wormald*, the executors, in their character of trustees, had no power to sell the land in question for the purpose of dividing the proceeds of the sale among the next of kin, however necessary a sale might be.

Returning now to the rule stated at page 4, it follows from thence that, if a testator's land be sold after his death, pursuant to a direction or under a power contained in his will, the proceeds of the sale will, except so far as they go to satisfy a charge or charges on the land,¹ or are otherwise effectively disposed of by the will, belong to the testator's heir or devisee both at law and in

¹ *Randall v. Bookey*, Ch. Prec. 162, 2 Vern. 425; *Stonehouse v. Evelyn*, 3 P. Wms. 252.

equity;¹ and if such land be sold by a trustee to whom the testator has devised it with a direction or authority to sell it, the proceeds of the sale will, subject to the qualifications just stated, belong to the testator's heir in equity, though they will belong to the trustee at law. It is plain, therefore, that a testator has the power to direct or authorize a sale of his land after his death only for the purpose of making some disposition of the proceeds of the sale, or of some part thereof, or of satisfying some charge or charges on the land, either already existing or created by the will; for, in the absence of any disposition of the proceeds of the sale, and of any charge to be satisfied out of them, they, as well as the land, will belong wholly to the testator's heir or devisee,² and therefore such heir or devisee alone can make an effective sale of it, or confer an effective power or authority to sell it, and any attempt by the testator to direct or authorize its sale will be invalid and inoperative.³ If, on the one hand, the testator in terms

¹ In *Pickering v. Lord Stamford*, 3 Ves. 492, 493-494, Lord Loughborough said: "Neither an heir at law, nor by parity of reason next of kin, can be barred by anything but a disposition of the heritable subject or the personal estate to some person capable of taking. Notwithstanding all words of anger and personal dislike applied to the heir, he will take what is not disposed of. It is impossible to make a different rule as to the personal estate with regard to what is not disposed of."

² Therefore the three farms in *Carter v. Haswell*, 26 L. J., Chan. 576, belonged absolutely to the testator's sister, and hence there was no authority to sell them.

³ It seems, therefore, that the trust for selling the land was invalid and inoperative in *In re Gordon*, 6 Ch. D. 531.

In *Cook v. Duckenfield*, 2 Atk. 566, Lord Hardwicke said (p. 568): "If a testator says, 'I will my heir shall sell the land,' and does not mention for what purpose, it is in the breast of the heir at law whether he will sell it or no, but when the testator appoints an executor to sell, his office shows that it is intended to be turned into personal assets, without leaving any resulting trust in the heir." It will be seen, therefore, that Lord Hardwicke admits that the direction to sell will be invalid if a consequence of a sale will be that the proceeds of the sale will belong to the heir. He is of opinion, however, in accordance with the notions which then prevailed, that the question whether such proceeds did belong to the heir, or went to the executor as a part of the testator's personal assets, depended upon the testator's intention, and accordingly he was of opinion that the fact of the testator's directing his executor to make the sale showed the latter to be his intention. This opinion, however, as to the efficacy of the testator's intention is clearly no longer law. It implies that a testator may give to the sale of his land, made after his death, the same effect that a sale by him in his lifetime would have had.

In *Chitty v. Parker*, 2 Ves. Jr. 271, a testator devised her land and personal estate to be converted into money, but made no gift except of pecuniary legacies, and all these were paid out of the personal estate, out of which they were primarily payable, and hence the land was not sold, and the court held that the land went to the heir as land. There was clearly no right in any one to have it sold. The bill was filed by the next of kin against the heir and was dismissed. The case of *Maugham v. Mason*, 1 Ves. & B.

confer a mere power to sell his land, his act will be a nullity, and any sale which may be made under it will confer no title upon the purchaser. If, on the other hand, the testator devise the land to a trustee in trust to sell it, though the devise will be valid, and will vest the legal title to the land in the trustee, yet the trust sought to be created will be void, and the trustee will become, from the moment of the testator's death, a mere depositary of the legal title, which he will hold for the benefit of the heir, whose servant he will be. He will have no power or authority over the land in equity, and the only obligation resting upon him will be to convey the legal title as the heir shall direct. The heir will not even have the option of calling upon the trustee to make a sale of the land according to the testator's direction. In short, the relation between the heir and the trustee will be the same as that which was created by the ancient use between the *cestui qui use* and the feoffee to uses. Such is always and necessarily the relation which exists between a trustee and a *cestui qui trust* who is in equity the absolute owner of the trust property, and *sui juris*.

There is also another reason why a direction by a testator to sell land is not valid unless he also make some disposition of the proceeds of the sale, or of some part thereof, or direct some charge on the land to be satisfied out of such proceeds, namely, that a direction is, in its nature, invalid unless it can be enforced, and such a direction as that under consideration cannot be enforced unless the testator create in some other person a "right" which will entitle him to enforce the direction, and the only way in which a testator can create such a right is by making a gift to some one of some portion of the proceeds of the sale directed, or of some interest therein, or by directing some charge upon the land, either created by the will or already existing, to be satisfied out of such proceeds.¹

410, where the bill was also dismissed, was substantially like *Chitty v. Parker*, except that the bill against the heir was filed by a residuary legatee instead of the next of kin. The case of the next of kin would, however, have been even more hopeless. See next note.

¹ Strange as it may seem, the principle stated in the text finds little formal recognition in the authorities. An idea seems to prevail extensively that a trust created by will, whether for the sale of land or for any other purpose, depends, for its validity, upon nothing but the testator's intention, provided that intention be lawful. It seems to be forgotten that there can be no trust and no trustee without a *cestui que trust*, and that the sole test of the validity of a trust is an ability in some person to enforce it. Thus, in *Attorney-General v. Lomas*, L. R. 9 Exch. 29, it was held that a testamentary trust for the sale of land was valid and binding, though all the gifts of the proceeds of the

For similar reasons to those just stated, a direction by a testator to sell his land, or to purchase land with his money, will not be valid if it be accompanied by an absolute gift of all the proceeds of the sale, or of all the land to be purchased, to a single person who is *sui juris*, for an absolute gift of all the proceeds of a sale of land is also a gift of the land itself,¹ and an absolute gift of all the land to be purchased with certain money is also a gift of the money itself, and hence the legatee, in the one case, becomes the absolute owner both of the land and the proceeds of its sale, and the devisee, in the other case, becomes the absolute owner both of the money and the land to be purchased with it, and it is therefore solely for the one to say whether the land shall be sold, and for the other to say whether land shall be purchased with the money.

So also a direction to sell or purchase land, though originally valid and binding, will cease to be so whenever a single person who is *sui juris* shall become absolutely entitled to all the proceeds of the sale or to all the land to be purchased.

So also if at any time several persons, all of whom are *sui juris*, become absolutely entitled to all the produce of land directed by a testator to be sold, or to all the land directed by him to be purchased, they can make the direction inoperative by uniting in giving notice to the person directed to make the sale or purchase not to do so.

If a testator who directs a sale or purchase of land also disposes of a part of the proceeds of the sale, or of a part of the land to be purchased, or directs a charge on the land to be satisfied out of the proceeds of the sale, the direction to sell or purchase will be valid, as it will then be merely an incident of the gift by which it is followed. So also it will be valid if it be followed by a gift of a limited interest only in a part or in the whole of the proceeds of the sale or of the land to be purchased. So it will if followed by an absolute gift of all the proceeds of the sale, or of all the land to be purchased, subject to the qualifications stated in the two preceding paragraphs.

C. C. Langdell.

CAMBRIDGE, Sept. 13, 1904.

[To be continued.]

sale had failed. The gifts in the will which eventually took effect consisted only of specific and pecuniary legacies. It is true that the pecuniary legacies were charged on the land, including three contingent legacies, namely, one for £3000 and two for £1000 each, but it must be assumed that they had all been paid. See preceding note.

¹ *In re Daveron*, [1893] 3 Chan. 421, 424.

ASSIGNABILITY OF CONTRACT.

THAT in the early common law conception of contract, it was regarded as creating a strictly personal relation, and that it was therefore quite as impossible for a party to substitute another in his place—to make an assignment of his contract—as it was for him to effect any other change in its terms, is now generally recognized.¹ That the doctrine has since been greatly modified is common knowledge. But the frequent failure of courts and text-writers to appreciate and clearly define the limits of such modification, and more particularly, to discriminate carefully between transactions superficially similar but essentially different, has led to considerable confusion of thought and inconsistency of decision.

In an attempt to clarify the subject, it is necessary to observe, at the outset, that the phrase “assignment of contract” is one of no precise significance; that the same contract may be assignable in one sense of the term and not in another; and therefore that the unqualified statement that certain classes of contract are assignable and certain other classes non-assignable is inaccurate and misleading. As a matter of fact there are four transactions, widely different in character, which fall under the general designation of assignment of contract:

1. An assignment which purports to transfer only the right to the benefit of performance by the other party;
2. An assignment which purports to transfer not only the right to the benefit of performance, but the right to direct or control such performance;
3. An assignment which purports both to transfer the rights and delegate the duties of the assignor;
4. An assignment which purports to transfer the rights and delegate the duties of the assignor, and also to relieve him from the obligation of the contract.

The four classes and the cases falling under them will be considered in the order named.

I. ASSIGNMENT OF RIGHT TO BENEFIT OF PERFORMANCE. If the contract be one for the payment of money, an assignment of

¹ Pollock on Contracts (6th ed.) 204, 701; Ames, 3 HARV. L. REV. 338, 339.

the benefit of performance — the assignor having already performed the obligation on his part or intending so to do — virtually amounts to an assignment of a chose in action. The theory upon which such assignments are upheld and enforced is so familiar that it need not be stated. If the performance required by the contract be other than the payment of money — as, for instance, the rendering of services, or the sale and delivery of goods, or the forbearance to engage in a trade, an assignment of the benefit of performance, while perhaps not a virtual assignment of a chose in action, may be supported upon the same theory — that the assignee has an implied power of attorney to receive performance, and in case of failure to perform, to maintain an action for damages for his own benefit.¹ And if it be contended that the assignment of such a contract should not be permitted because it would compel the contractor to render service or deliver goods to a stranger to the contract, the obvious answer is that an assignment of a debt likewise compels the payment of money to a stranger, and that if the assignee acquire only the right to the benefit of performance, and no supervision or control of the time, manner, or place of performance, the cases are indistinguishable.

II. ASSIGNMENT OF RIGHT TO BENEFIT BY, AND RIGHT TO DIRECT OR CONTROL PERFORMANCE. Clearly here is something very different from an assignment of a mere chose in action. In this case the contractor is directed by the assignment not only to perform for the benefit of a stranger, but according to the will of a stranger; not only to pay money or deliver goods or render services to a person other than the one with whom he contracted, but to do so (within the terms of the contract) at the time or place or in the manner dictated by him. Such an assignment certainly effects a very material change in the terms of the contractor's obligation, and should be permitted only with his express or implied assent — to be looked for, of course, in the nature and terms of the contract.²

III. ASSIGNMENT OF RIGHTS, ACCOMPANIED BY A DELEGATION OF DUTY. This transaction, like that of the second class but to a greater degree, alters the terms of the engagement. For here a party to the contract is asked not only to perform for the benefit of a stranger, but to accept the performance of that stranger in

¹ *Francisco v. Smith*, 143 N. Y. 488; *Hedge v. Lowe*, 47 Ia. 137; *Up River Ice Co. v. Danler*, 114 Mich. 296.

² See *Kepp v. Wiggett*, 6 C. B. R. 290, n. (a).

lieu of that of the person with whom he contracted. Obviously the case should be governed by the same rule—that of an express or implied assent to the assignment, to be sought in the nature and terms of the contract.

(a) *Contracts to sell goods.* 1. Assignment by seller. If, because of the buyer's reliance upon the skill, judgment, and taste of the seller in the production, selection, or preparation of the goods, or for any other reason, the parties appear to have contemplated performance by the seller personally, an assent to the delegation of the seller's duties cannot be implied.

Such a case is *Shultz & Co. v. Johnson's Adms.*¹ One Johnson, it appears, engaged to furnish to Shultz & Co. "six successive crops of hemp of his own raising, embracing each year all the hemp he can raise upon not less than one hundred nor more than one hundred and sixty acres of land." After performing for two years, Johnson died, and Shultz & Co. refusing to accept hemp raised on the same farm by his administrators, the latter brought action for breach of covenant. It was insisted by the administrators that the only object of inserting the clause "of his own raising" was to prevent Johnson from buying a crop upon land yielding the smallest quantity to the acre in case the market price should be higher than the contract price, or a crop upon land yielding the largest quantity if the market price should be lower. But the court assumed the right to presume that the value of hemp depends upon the attention, skill, and experience in raising it, declared that the words "of his own raising" showed that the defendants relied upon Johnson's attention, skill, and experience, and held that the contract was a personal one. A case very similar in its facts but in which an opposite conclusion was reached is *La Rue v. Groesinger*,² holding that a contract by one Hopper to sell to defendant "all the grapes which he might raise during a period of ten years, from the vines which were then growing or which he might thereafter plant" in a certain vineyard, the grapes to be sound and to be gathered when they contained 22 per cent of saccharine matter, was so assignable, and that therefore the defendant was compelled to accept grapes from a purchaser of the vineyard. The court discusses the case of *Shultz v. Johnson*,³ and contends that the phrase "he might raise" does not have the

¹ 5 B. Monroe (Ky.) 497.

² 84 Cal. 281.

³ *Supra*.

significance of the phrase "of his own raising"; that the pronoun "he" does not import a desire for the personal service or attention of the owner, but is used merely as an equivalent to his proper name. Aside from this rather nice distinction, however, the court indicates in its opinion a view unusually favorable to the assignability of this class of contracts. "There is nothing," it says, "in the nature or circumstances of the case which shows that the skill or other personal quality of the party was a distinctive characteristic of the thing contracted for or a material inducement to the contract. . . . It is not impossible that one man might have some peculiar skill or secret by which he could raise better grapes from the same vines than other men could. But there is no evidence that there was any such peculiarity about the original owner of this vineyard and we do not think that the court will assume that there was." In other words, the presumption is in favor of assignability.

An interesting question here presents itself. Assuming that there is no reliance upon the personal performance of the seller, and that therefore he may make an assignment of the class under discussion, is the personal distastefulness of the assignee himself to the buyer of any consequence? No case has been found in which the precise point has been raised. But the opinion of the court in the much discussed case of *Boston Ice Co. v. Potter*¹ throws some light upon it. The defendant, in 1873, was supplied with ice by the plaintiff, but on account of some dissatisfaction with the manner of supply, terminated his contract with it and made a contract with the Citizens' Ice Co. to furnish him with ice. Subsequently the Citizens' Ice Co. sold its business to the plaintiff with the privilege of supplying ice to its customers; the plaintiff furnished ice to the defendant — the defendant being unaware of the assignment — and brought an action to recover the price. The action was not brought in the name of the assignor, and the right to recover was sought to be upheld, not upon the theory of an assignment to the plaintiff of the contract between defendant and the Citizens' Ice Co., but upon an implied contract between the parties to the action. Yet the court, in denying the right to recover, indicates that if the plaintiff had based its cause upon the assignment to it of the contract between the defendant and the Citizens' Ice Co., the result would have been the same. "A party

¹ 123 Mass. 28.

has a right," says the court, "to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent . . . If the defendant before receiving the ice, or during its delivery, has received notice of the change, and that the Citizens' Ice Co. could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff." In thus failing to recognize a distinction between the case where the distasteful person claims to be the original contractor with the defendant and the case where he claims to be an assignee of a contract with the defendant, it is believed that the court is wrong. It must be conceded that to compel a buyer to accept performance from an assignee who is personally distasteful is to impose a hardship upon him; but it is perhaps no greater hardship than that which is suffered by a debtor who is forced to pay his debt to a personally distasteful assignee of his creditor. Moreover, to permit the buyer to refuse to perform on such a ground would be practically to make the contract in every case non-assignable by the seller.

2. Assignment by buyer. Correlatively, if the seller appear to have relied upon the personal performance by the buyer of the duty of payment, delegation of that duty should not be permitted.

It is in this class of cases that the greatest confusion and error are found. In the first place, the courts have drawn a line between sales for cash on delivery and sales on credit, holding that in the former the buyer may transfer his rights and duties, while in the latter he may not.¹ The distinction appears to be an arbitrary one. Certainly the seller for cash on delivery may rely in many cases upon the buyer's character for prompt payment, just as much as the seller on credit. It is true that if payment is not made he still has the goods, but in case the goods are manufactured or produced or prepared upon a special order of the buyer they may be of little value on the market.

In the second place it is submitted that upon principle, in a contract for the sale of goods, whether for cash on delivery or on credit, the buyer should be allowed to make an assignment of his right to receive the goods and to delegate his duty of paying for them — in the absence, of course, of other evidence of an

¹ Ark. Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379; Hardy v. So. Bend Iron Works, 129 Mo. 222; Lansden v. McCarthy, 45 Mo. 106.

intent to the contrary. There is nothing in the nature of the buyer's duty—the payment of the money—which makes its satisfactory performance dependent on his skill, taste, or judgment. The assignee of the buyer, if able and willing, can pay money as well as his assignor, just as the assignee of the seller, if able and willing, can deliver coal as well as his assignor. Moreover, the right to the benefit of the character, credit, and substance of the assignor is not lost. On the contrary the assignment is a distinct benefit to the seller, for by its operation he acquires a right of action against the assignee¹ and yet retains the liability of the assignor.² As it is well put in *Rochester Lantern Co. v. Stiles & Parker Press Co.*,³ "The contract was not purely personal in the sense that Kelly was bound to perform in person, as his only obligation was to pay for the dies when delivered and that obligation could be discharged by any one. He could not, however, by the assignment, absolve himself from all obligations under the contract. The obligations of the contract still rested upon him and resort could still be made to him for the payment of the dies *in case the assignee did not pay for them when tendered to it.*"

It is a pleasure to find that the House of Lords and the New York Court of Appeals in recent cases of sales on credit have disregarded the unreasonable distinction and upheld an assignment by the buyer.⁴ It must be admitted, however, that in neither case does the point appear to have been called to the attention of the court.

If by the terms of the contract it appears that the seller looks to the buyer to do more than merely to receive and pay for the goods, it may very properly be held to be non-assignable. Several of the cases of sales on credit may be supported upon this distinction. Thus, in the well known case of the *Arkansas Valley Smelting Co. v. Belden Mining Co.*,⁵ the contract was for the delivery of lead ore and contained the following stipulation:

¹ *Smith v. Flack*, 95 Ind. 116; *Bach v. Boston, etc., Mining Co.*, 16 Mont. 467; *Wiggins Ferry Co. v. C. & A. R. Co.*, 73 Mo. 389; *Gamble v. Gates*, 97 Mich. 461.

² *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N. Y. 209; *Martin v. Ómdorff*, 22 Ia. 504; *Carrier v. Taylor*, 19 N. H. 189; *Crane v. Kildorf*, 91 Ill. 567; *Brassel v. Troxell*, 68 Ill. App. 131; *Liberty Wall Paper Co. v. Stoner Co.*, 59 App. Div. (N. Y.) 353.

³ *Supra*, n. 2.

⁴ *Tolhurst v. Portland Cement Mfrs.*, [1903] A. C. 414; *Liberty Wall Paper Co. v. Stoner*, 170 N. Y. 582, affirming without opinion, 59 App. Div. 353.

⁵ 127 U. S. 379.

"The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party whose assay shall be final." The buyer's duty was not merely to receive the ore and pay the price, but to make an assay for the purpose of fixing the price, and since the proper performance of that duty may be said to depend upon the integrity and skill of the buyer, it would not be unreasonable to hold that the seller anticipated personal performance by the buyer and that the buyer's duties were not transferable. As a matter of fact, the Supreme Court held that the buyer's assignment could not be supported, but rested its decision upon the less satisfactory ground that the sale was on credit.

Again, in *Hardy v. So. Bend Iron Work Co.*,¹ which is decided on the credit theory, it appeared that the defendant contracted to sell certain plows to Mason and Hardy on credit; that in the contract it was stipulated that in case Mason and Hardy desired to purchase other or further plows during the year such purchases should be made upon certain conditions as to credit and discount; that it was further stipulated in the contract that the defendant would not sell plows to any other person in the vicinity during the year. Before the time stipulated for the delivery of the plows by the defendant, Mason withdrew from the firm and assigned his interest in the contract to Hardy, whereupon and wherefor defendant refused to ship the goods. It is obvious that in this case the buyers were expected not only to receive and pay for the plows bought by them, but to endeavor to sell as many of the seller's plows as possible. It follows that there was a reliance by the seller upon the business judgment and ability of the buyers, and that such buyers could not assign their rights and duties under the contract.

The same is true of the earlier Missouri case of *Lansden v. McCarthy*.² The defendant agreed to furnish on credit to the plaintiff's assignors at the St. Charles Hotel all the fresh beef,

¹ 129 Mo. 222.

² 45 Mo. 106.

pork, and mutton that might be required at the hotel for the ensuing year at ten cents per pound. Plaintiff bought the hotel and took an assignment of the meat contract, but defendant refused to continue performance. The court held that the assignment could not be supported, because of the stipulation for credit. The decision might have been rested, however, upon the ground that the seller's agreement to sell at the price mentioned may have been induced by the expectation that the hotel would thrive and that large quantities of meat would be required and ordered. Such expectation would obviously denote a reliance upon the personal judgment and skill of the buyer in the management of the hotel, and would render the contract non-assignable in the sense under discussion.¹

In the recent House of Lords Case of *Tolhurst v. Associated Portland Cement Manufacturers*, already referred to, the importance of this element of reliance upon the peculiar character of the buyer was recognized. The facts of the case were in many respects similar to those of the *Arkansas Valley Smelting Co. v. Belden Mining Co.*² *Tolhurst*, the owner of chalk quarries, made a contract with the *Imperial Portland Cement Company* by which it was agreed that he would for fifty years supply to the company and that the company should take and buy from him at least seven hundred and fifty tons of chalk per week at a certain price to be paid monthly, and so much more, if any, as "the company shall require for the whole of their manufacture upon their said land," near the quarries. The *Imperial Company* afterward assigned the contract and sold its works and business to the *Associated Company*, whereupon *Tolhurst* claimed that he was not bound to perform to the assignee. As has already been said, the point that the contract was non-assignable because it provided for deliveries on credit does not appear to have been made. But it was strongly urged upon the court that the assignee had a much larger capital and business than the assignor, that it therefore would probably require much larger quantities of chalk, and that the contract had been made in contemplation of the needs of the smaller company only, and that to compel the seller to supply the needs of the larger one would be to compel him to do something very different from that which he had agreed to do. The court

¹ See also, *Wheeler v. Walton & Whain Co.*, 64 Fed. 664.

² 127 U. S. 379.

held the contract assignable, declaring that little emphasis should be given the words "the Company" and "their" in the contract, and pointing out that the length of the duration of the contract, the fact that there was no reliance upon personal skill or personal confidence, and the further circumstance that the buyer was induced to purchase the land and establish the works by the prospect of advantages flowing from immediate connection with Tolhurst's quarries, precluded the notion that the contract was dependent upon the continuation in business of both parties. "Very great hesitation," however, was expressed by Lord Chancellor Halsbury, and Lord Robertson entered a strong dissent.

Before leaving this class of cases, it should be noted that where the buyer engages to give a promissory note for the price of goods, he cannot assign the contract so as to compel the seller to accept the note of his assignee. The duty of giving a promissory note, unlike that of paying money, is plainly personal — the *money* of the assignee is the same as that of the assignor, but his *note* is very different.¹ For the same reason, a seller cannot delegate his duty of warranting the goods to be delivered under the contract.²

(b) *Contracts of agency.* 1. Assignment by employer. An assignment by the employer of the benefit of the service, accompanied only by a delegation of the duty of paying the employe, would appear to be unobjectionable. As has been said of the cases of sales, the payment of money is a duty the performance of which requires no particular skill nor judgment nor taste. But if the assignment purports to transfer the right to direct or control the employe's performance, as in nearly every case it must, the employe will be released.³

2. Assignment by employe. Whether the assignment by the employe of his right to compensation, coupled with a delegation of his duty of performance, is sustainable, depends entirely upon the character of the service required by the contract. If the employe be a servant, as distinguished from an agent, whether the performance of his duty requires skilled or common labor, he cannot make such an assignment. For "the servant's character, habits, capacity, industry, and temper, all enter into and affect the contract which the master makes, and are material and essential

¹ *Rappleye v. Racine Seeder Co.*, 79 Ia. 220.

² *Sprinkle v. Truelove*, 54 N. E. (Ind.) 461.

³ *Globe, etc., Ins. Co. v. Jones*, 89 N. W. (Mich.) 580; *Hayes v. Willio*, 4 Daly (N. Y. C. P.) 259; *Huffcut on Agency* § 86; and see *Lacy v. Getman*, 119 N. Y. 109.

where the service rendered is to be personal and subject to the daily direction and choice and control of the master."¹ If he be an agent, the test is whether the performance of his duty involves the exercise of judgment, skill, taste, or discretion. If it does, the reasonable inference is that the principal relied upon his possession of the qualification, and that a vicarious performance will not satisfy the contract.² And perhaps it should be added, in this connection, that where some of the duties of the agent involve the exercise of discretion and others do not, the former may not be delegated while the latter may.

(c) *Engagements of Independent Contractors.* There are a number of interesting cases involving the right of an independent contractor to transfer both his right to compensation and his duty of performance. Indeed, the most frequently cited illustrations of non-assignable contracts are of this class—engagements to paint a portrait, to make a carriage, to write a book, *et cetera*. In most of the cases the true test—that of intention as manifested by the character of the performance required—is recognized and applied. Unfortunately the results are not always harmonious. For example, it is difficult to reconcile the two cases of *Robson v. Drummond*³ and *British Wagon Company v. Lea*,⁴ the first holding an engagement to repair and paint a carriage non-assignable, the second holding an engagement to repair railroad wagons assignable. And with reference to public printing contracts there likewise appears to be a conflict of authority, South Dakota holding them assignable and Kansas holding them non-assignable. In this instance, however, it is thought that the two cases may be distinguished. In the South Dakota case⁵ the court points out that under the state law the contract must be let to the lowest responsible bidder, the only limitation being that the contract should not be let to parties outside of the state. "It will thus be seen that the question of the personal qualification of the contractor does not enter into the contract. The contract is not for the personal services of the contractor, and he may do the work through agents or assignees."

¹ *Lacy v. Getman*, 119 N. Y. 109, at 115. See also *Litka v. Wilcox*, 39 Mich. 94.

² *Huffcut on Agency* §§ 92-94 and cases cited; also *Sloan v. Williams*, 138 Ill. 43, and *Marquette v. Wilkinson*, 78 N. W. (Mich.) 474.

³ 2 B. & Ad. 303.

⁴ L. R. 5 Q. B. D. 149.

⁵ *Carter v. State*, 8 So. Dak. 153.

In the Kansas case,¹ on the other hand, there is nothing in the report to indicate that the printing was let or was required to be let to the lowest bidder, or even that bids were received. The court was justified in inferring, under such circumstances, that the contract was made with a view to the superior qualification of the contractor. For, as the court says: "Printing is an art; it is more than a mere mechanical pursuit. Given the requisite type and other appliances, some who practise it can make a printed page as pleasing to the artistic sense as a picture; while others, with the same advantages, can produce nothing that is not grievous to the judgment, eye, and taste."²

IV. ASSIGNMENT OF RIGHTS, DELEGATION OF DUTY, AND RENUNCIATION BY ASSIGNOR OF LIABILITY FOR FURTHER PERFORMANCE. That the *obligation* of a contract cannot be transferred without the consent of the obligee, is fundamental. "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract."³ It follows that an assignment which purports to transfer both the rights and the obligations of the contract amounts to a renunciation, and absolves the other party from further performance. This is the meaning, it is presumed, of the oft repeated, though somewhat obscure statement that "Rights arising out of contract cannot be transferred if they are coupled with liabilities,"⁴—that is to say, coupled with liabilities not in the *contract* but in the *assignment*. If the renunciation by the assignor of liability for further performance be express, the case is perfectly clear. But in the absence of express renunciation it is not easy to determine whether by "assigning" the contract it was intended to transfer its obligation or not. Since an attempt so to do would in no case be effective, and moreover would constitute a breach of the contract, it is thought that the presumption should be

¹ Campbell v. Comm'rs, 67 Pac. 866.

² See also Ellis v. State, 4 Ind. 1. In contracts for construction of public works, paving streets, cleaning streets, etc., the contractor is permitted to assign rights and delegate duties: Devlin v. The Mayor, etc., 63 N. Y. 8; City v. Clemens, 42 Mo. 69; Philadelphia v. Lockhardt, 73 Pa. St. 211; Columbia Water Co. v. Columbia, 5 S. C. 225; Ernst v. Kunkle, 5 Oh. St. 520; Taylor v. Palmer, 31 Cal. 240.

Other interesting independent contract cases are: Galey v. Melton, 172 Pa. St. 443; Mirror v. Galvin, 55 Mo. App. 412; Pike v. Waltham, 47 N. E. (Mass.) 437; Edison v. Bapka, 69 N. W. (Mich.) 499; Jenkins v. Land Co., 13 Wash. 502; Northwestern Cooperage Co. v. Byers, 95 N. W. (Mich.) 529.

³ Humble v. Hunter, 12 Q. B. 310, at 317.

⁴ Pollock on Contract (4th ed.) 425.

against such an intention, and that when the other party to the contract is notified of the assignment he may perform for the benefit of the assignee without losing his remedy against the assignor. There are many circumstances, however, which might overcome the presumption, and some of the cases holding that the rights and duties of a vendee are non-assignable may be sustained upon this ground. For example, in *Hardy v. South Bend Iron Works*¹ the facts that the assignor was a partnership and that the assignment was made upon its dissolution, might justify the inference of an intention to renounce liability for further performance. Yet such does not appear to have been a ground of decision, for the court says: "We need not discuss whether Mason [the retiring partner] would continue liable to defendant for faithful performance after dissolution of the firm. That is not in issue here." And in *British Wagon Company v. Lea*² the fact that at the time of the assignment the assignor company was actually in process of liquidation was not sufficient to lead the court to infer that the intent was to renounce liability. Says the court: "So long as the Parkgate Company [assignor] continues to exist, and through the British Company [assignee] continues to fulfill its obligation to keep the wagons in repair, the defendant cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company had incapacitated themselves from performing their obligations under it, or that by transferring the performance thereof to others they have absolved the defendants from further performance on their part."³

In this connection attention must again be called to *Arkansas Valley Smelting Company v. Belden Mining Company*.⁴ Here the contract was assigned twice,—first by Billings & Eilers, upon their dissolution, to Billings, and subsequently by Billings to the plaintiff. It may not be unreasonable to infer from the fact of dissolution of the partnership that the intention of the original buyers, Billings & Eilers, was to renounce liability for further performance. As to the first assignment, therefore, the defendant might well have claimed to be absolved by such renunciation. To quote the opinion of Mr. Justice Gray, the defendant "could not

¹ 129 Mo. 222.

² L. R. 5 Q. B. D. 149.

³ See also *Horst v. Roehm*, 84 Fed. 565, and *Tolhurst v. Associated Cement Manufacturers*, [1903] A. C. 414.

⁴ 127 U. S. 379.

be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it contracted." As a matter of fact, however, the defendant chose to accept the liability of Billings, the assignee under the first assignment, and refused to perform only upon the assignment by Billings to the plaintiff. Moreover, there was no circumstance attending this second assignment which indicated an intent on the part of the assignor to renounce. It is submitted, therefore, that such an intent should not have been inferred, and that the assignment should not, upon that ground, have been condemned.

Frederic C. Woodward.

NORTHWESTERN UNIVERSITY LAW SCHOOL

THE GAGE OF LAND IN MEDIEVAL ENGLAND.¹

II.

THE English gage of land with possession of the debtor until default is to all seeming developed later than the gage with immediate possession of the creditor; the origin of this later form of security for loans being directly connected with the history of the process of judicial execution.²

Before, however, taking up this phase of the development, we wish to tarry a moment in the realm of medieval "charges," "liens," "burdens" and "encumbrances" on land that are created for purposes other than the securing of debts owing to creditors. Here, in certain instances at least, a right *in rem* is created in favor of one who does not take immediate possession of the burdened land; but different opinions may perhaps be held as to whether in such cases there is really a gage of land in the sense of a security for a personal claim. Thus, for instance, the warranty of title to land conveyed may create a charge on other land remaining in the hands of the warrantor, and the endowment of the wife at the door of the church may create a charge on all the land of the husband. In such cases, should the feoffee be ousted or should the husband die in the lifetime of the wife, the land previously bound by the warranty or by the endowment may be followed into the hands of third persons and made to answer the claim of the feoffee or the widow. To

¹ Continued from 17 HARV. L. REV. 557.

² Franken, Das französische Pfandrecht im Mittelalter 7, and Brunner, Grundzüge der deutschen Rechtsgeschichte 189, 190, take this view as to the Germanic law on the Continent. 2 Heusler, Institutionen des deutschen Privatrechts 135, 143-150, maintains that both the gage with and the gage without the creditor's possession appear equally early in old German law, and that indeed there is no direct connection between judicial execution and the origin of the gage with debtor's possession. For views of other legal scholars see 2 Heusler, Institutionen 144, and Wigmore, The Pledge-Idea, 10 HARV. L. REV. 341-350. Although the present writer alone is responsible for views held in this paper, he wishes to express indebtedness to his friends Professor Gierke and Dr. Neubecker, of the University of Berlin, for suggestions as to the nature of the gage with possession of the debtor, more especially the German *Hypothek*.

give immediate possession of the burdened land to the feoffee or the wife would be needless and indeed without meaning; the creation of the charge, the right *in rem*, is all that is necessary.¹

In the medieval period warranty is the obligation of defending the title to land conveyed, and, should the defense fail, of giving to the evicted owner other land of equal value in exchange, an *excambium ad valentiam*;² the warranty being generally enforced by voucher or by the writ of *warrantia cartae*, sometimes it would seem by writ of Covenant.³ Besides the warranty binding only the warrantor and his heirs, warranty may in the thirteenth century create also, as we have just stated, a charge or lien on other lands remaining in the hands of the warrantor that is enforceable against the whole world. In the words of Bracton: *Non solum obligatur persona feoffatoris . . . , poterit etiam tenementum obligari cum persona tacite vel expresse*.⁴

This lien or charge, this *obligatio rei*,⁵ may arise, therefore, out of an express warranty or out of a tacit warranty. An express warranty binds a certain designated tenement.⁶ A tacit warranty implied in a feoffment binds, says Bracton, all the other lands that the feoffor has on the day of the feoffment.⁷ That the feoffee of the warrantor acquires a right *in rem* is shown by the fact that land bound by warranty passes to everyone with the charge. The land is bound in the hands of the warrantor's heirs. It may be followed into the hands of assigns, and even into the hands of the king and the chief lord, who has it as an escheat. Should the warranty fail and should the burdened land be called for to answer

¹ For the German law see 2 Heusler, *Institutionen* 135, 147, 148.

² See Glanvill, III.; Bracton, f. 257b-261b, 380-399b; Beames, notes to Glanvill, III., Beale's edition; Holmes, *Common Law* 372; 1 Gray, *Cases on Property* 416-419. Compare 2 Brunner, *Deutsche Rechtsgeschichte* 516; 2 Pollock and Maitland, *Hist. Eng. Law* 663.

³ See Bracton, f. 399, and 2 Pollock and Maitland, *Hist. Eng. Law* 218, n. 4, 664. Compare Rawle, *Covenants for Title*, 5th ed., 12, 16.

⁴ Bracton, f. 382. In the later Middle Ages a mere warranty would not bind the other lands of the warrantor in whatsoever hands they might come. To create a lien on the land it was necessary to bring an action of *warrantia cartae* and get a judgment *pro loco et tempore*. See Rawle, *Covenants for Title*, 5th ed., 12, 13.

⁵ See Bracton, f. 382, 388b, and the thirteenth-century annotations to Bracton's *Note Book*, pl. 748.

⁶ Bracton, f. 382; Bracton's *Note Book*, pl. 748, and thirteenth-century annotations; Y. B. 20-21, Ed. I., pp. 359-361. See Maitland, *Bracton's Note Book*, pl. 748, note 7.

⁷ Bracton, f. 382, 382b, 388, 388b; Bracton's *Note Book*, pl. 748, thirteenth century annotations.

the claim of the warrantor's feoffee, every possessor must give up the land.¹

In the legal literature of the twelfth and thirteenth centuries the *dos* is represented as a gift from the bridegroom to the bride *ad ostium ecclesiae*² at the time of the marriage ceremony, and yet as a gift which the law compels the bridegroom to make.³ The gift may take the form of a dower of certain definite lands, but never more than a third of all the lands of the husband; and in this form the dower is called a *dos nominata*.⁴ A *dos rationabilis*, on the other hand, is in the twelfth century the dower of a third of all land in the freehold seisin of the husband on the day of the nuptials; and, when the husband fails to give a *dos nominata*, it is assumed by the law that he wishes to give a *dos rationabilis*.⁵ In the time of Britton the wife has a right, in the case of a *dos rationabilis*, to a third of all the lands in the seisin of the husband during his entire life;⁶ and this is the rule of the common law.⁷

In the time of Bracton the wife seems to acquire at once, by the giving of a *dos nominata*, "true proprietary rights" in the lands. Unless she has joined with her husband in the levying of a final concord before the king's justices, she is entitled, on his death, to recover the very land designated from any one who now has it in his hands. If the tenant be sued by the woman, he will vouch the heir of the husband. The heir will probably be obliged to warrant the gift of his ancestor, and, should he fail in this, he must give the evicted tenant a compensation in value out of other lands of the ancestor. This, however, does not con-

¹ See Bracton, f. 380-382b, 388, 388b; Bracton's Note Book, pl. 638, 748, 1024; Fleta, lib. VI. c. 23, § 17; Maitland, Bracton's Note Book, pl. 748, note 7; Holmes, Common Law 394, 395. Holmes, Common Law 395: "Fleta writes that every possessor will be held. There cannot be a doubt that a disseisor would have been bound equally with one whose possession was lawful." The various writs will be found very fully collected in Bracton, f. 380-399b.

² The endowment is at the door of the church to insure publicity and solemnity. See Coke on Littleton 34a; Beames, Translation of Glanville, Beale's ed. 94, n. 2; 2 Pollock and Maitland, Hist. Eng. Law 374, 375.

³ Compare Co. Lit. 30b, 31a.

⁴ In the later Middle Ages the *dos nominata* may be more than a third of all the lands. See Littleton, §§ 37, 39; 2 Pollock and Maitland, Hist. Eng. Law 421, 425, 426. Compare Co. Lit. 33b.

⁵ Glanvill, VI. 1, 2, 17; Bracton, f. 92; 1 Reeves, Hist. Eng. Law 155, 156; 2 Pollock and Maitland, Hist. Eng. Law 420, 421, 425.

⁶ 1 Nichols, Britton, pp. xli, xlii, and 2 *idem* 238, 242; 2 Pollock and Maitland, Hist. Eng. Law 421.

⁷ Littleton, § 37; Co. Lit. 33b. Compare 2 Reeves, Hist. Eng. Law 577-579.

cern the wife at all. Her right is to the land named by her husband and she can evict the tenant.¹

If one-third of the land that the feoffee holds under the feoffment from the husband be claimed by the widow as *dos rationabilis*, and if the feoffee vouch the heir to warranty, the widow must see that the heir appears in court, for the heir is also the warrantor of her dower. If it be confessed by the heir that sufficient other lands have come to him to endow the widow, the feoffee will be allowed to keep his land and the widow will be given a judgment against the heir. Should, however, the heir have no other lands, then the widow can recover a third of the land held by the feoffee. The feoffee will get judgment against the heir; and, on the death of the woman, the feoffee will get back the land that the widow has been holding as dower. As expressed by Pollock and Maitland: "The unspecified dower is therefore treated as a charge on all the husband's lands, a charge that ought to be satisfied primarily out of those lands which descend to the heir, but yet one that can be enforced, if need be, against the husband's feoffees."²

Again, it is not uninstrusive to observe that feudal services and rents-service are in the medieval law a "charge" or "burden" on the land held by the tenant.³ Should the tenant make default, the lord may not only distrain the chattels that are on the encumbered land, but he may reach the land itself. The tenement may be forfeited to the lord; or, the lord may enter into possession and reduce his claim out of the fruits of the land; or, he may enter and hold the land as a mere distress, with no right to keep it as a forfeiture and with no right to satisfy himself out of the profits.⁴

¹ Bracton, f. 299b; ² Pollock and Maitland, Hist. Eng. Law 422, 423. On the legal nature of the wife's right in the land before the husband's death, compare Bracton, f. 300b; Beames, Translation of Glanville, Beale's ed., 97, n. 3. See Glanvill, VI. 3.

² Bracton, f. 300; ² Pollock and Maitland, Hist. Eng. Law 423, 426. For the writs of the dowager see Glanvill, VI.; Bracton, f. 296-317b; ² Britton, liv. V., c. IV.-XIII.

³ See, for instance, Stat. Glouc., 6 Ed. I. c. 4; Stat. West. II, 13 Ed. I. c. 21; ¹ Britton, liv. II. c. XVIII, § 10; Holmes, Common Law 388. Similar in its effect is the so-called *Abmeiерungsrecht* in the case of the German *Erhpacht* and the *emphyteusis* of Roman law and the German common law. Compare also von Amira, Das Altnorwegische Vollstreckungsverfahren (1874) 314 *et seq.*

⁴ Note, further, the special significance of the rent-charge in the English medieval period. Compare ² Heusler, Institutionen 150-153.

By the feudal law failure of the tenant to perform the services results in a forfeiture of the land; but only after the tenant has been adequately warned and after judgment of the lord's court. If the tenant be summoned three times without responding, the feudal law enables the court to put the lord into possession for a year. Should the tenant redeem within the year, possession is restored to him; but should he not redeem, he loses the land.¹

Forfeiture may also be enforced by writ of *cessavit per biennium*, introduced by statute in the reign of Edward I. If the tenant fail to perform his services or pay his rent for two years, and if there be insufficient chattels for a distraint, the lord may obtain a writ of *cessavit* out of chancery. This writ enables the lord, if the tenant still fail to redeem by tendering his arrears and damages before judgment, to recover the land or fee itself in demesne. The land thus adjudged to the lord is forfeited for ever, for the tenant has now no right to redeem.²

What practically amounts to forfeiture is also found in the Kentish custom of *gavellet*. If the tenant of land held in gavelkind falls into arrears with his services and rents, the lord is to get permission of his own Three-Weeks-Court to distrain the chattels of his tenant found upon the tenement; and the lord in thus seeking to distrain is to be accompanied by good witnesses. This attempt to distrain is to be continued for four sessions of this court of the lord, and if before the fourth court sufficient chattels cannot be found, the court then awards that the lord may take the tenement into his hands *en noun de destresse ausi cum boef ou vache*. The lord may keep the land in his hands a year and a day, but without fertilizing it; and within this period the tenant may, if he pay his arrears and make reasonable amends for the withholding, enter once more into his land. If, however, the tenant do not thus redeem, the lord may then make all the proceedings public at the next county court, and in the session of his own court following this public declaration it is finally awarded that the lord may enter into the tenement and

¹ See 2 Chron. Abingd. 128; Wright, Tenures 197-199; Gilbert, Rents 3, 4; Robinson, Gavelkind 195; 2 Reeves, Hist. Eng. Law 186; 1 Pollock and Maitland, Hist. Eng. Law 354. See also Placita Ang.-Norm. 97.

² See Stat. Glouc., 6 Ed. I. c. 4; Stat. West. II, 13 Ed. I., c. 21; F. N. B. f. 208 H, 209, 210 A.; Coke, 2 Inst. 295, 400, 460; 3 Blackstone c. 15, § I; Co. Lit. 47a, n. 4; Co. Lit. 142a, n. 2; Co. Lit. 143b, n. 5; Booth, Real Actions 133-135; Wright, Tenures 202; Robinson, Gavelkind 193-195; 1 Pollock and Maitland, Hist. Eng. Law 353.

cultivate it, taking the profits as in his own demesne (*si come en son demeyne*).¹

If now the tenant comes after this award of the lord's court and wants to get back the tenement, thus treating the whole transaction as in effect a mere pledge *quousque*, he is obliged, before this can be done, to perform the services and pay the rent, and must in addition make proper amends to the lord for the withholding of the services or rent.²

The copies of the custumal differ, however, as to just what amends the tenant must make, a good deal depending apparently upon an old Kentish by-word printed in the custumal; and owing, it would seem, to this uncertainty as to the proper reading of this by-word, it has always been a mooted question whether the Kentish *gavelet* was intended as a continuing security, with a right of redemption even after adjudication to the lord, or whether there was an absolute forfeiture. According to the generally accepted reading of the by-word, the tenant seems to have a theoretical right to redeem by paying the arrears nine — or eighteen? — times over, and in addition a wergild of £5. As legal scholars have pointed out, this is practically an impossible condition, and there is in reality a forfeiture of the tenement, though the ancient law in its forbearance is loath to say so.³

Our sources leave us in no doubt, however, that in London the medieval procedure by *gavelet* may result in absolute forfeiture. According to the Statute of Gavelet,⁴ usually attributed to the tenth year of Edward II.'s reign, if the rents be in arrear, the lord shall first distrain all the chattels on the land, and then, if these be insufficient, he may begin proceedings in *gavelet* by a writ *de consuetudinibus et servitiis*. If the tenant deny the fact that he owes services or rents, the lord must then prove in court by witnesses that he is seised of the services or rents now in arrear; and if this be proved, the lord shall then recover his tenement in demesne by

¹ *Consuetudines Cantiae*, 1 Statutes of the Realm 224a, 225; Lambarde, Perambulation of Kent 498, 499, 526–528; 2 Reeves, Hist. Eng. Law 186, 187; Robinson, Gavelkind 195, 196. Compare Co. Lit. 142a, n. 2.

² *Consuetudines Cantiae*, 1 Statutes of the Realm 225; Lambarde, Perambulation 528; Robinson, Gavelkind 196.

³ For details as to this question see *De Wandlesworth's Case*, reported in Robinson, Gavelkind 197; 1 Statutes of the Realm 225, n. 1; Lambarde, Perambulation 449; Robinson, Gavelkind 196–202; 1 Pollock and Maitland, Hist. Eng. Law 355, n. 1. Compare 2 *idem* 591–593.

⁴ *Statutum de Gaveleto in London*, 1 Statutes of the Realm 222; Robinson, Gavelkind 194; Co. Lit. 142a, n. 2; 2 Reeves, Hist. Eng. Law 186, 187.

judgment of court. If, however, the tenant acknowledge the services or rents and the arrears, then by judgment of court the arrears shall be doubled, and the tenant must also pay a fine to the sheriff for the wrongful withholding of the rents. If the tenant do not come, after due summons, to render the doubled arrears and to pay the fine, either because he is unwilling or unable to make satisfaction, the land shall be delivered to the lord by the court to be kept in his hands for a year and a day. Within this period the tenant may redeem his land by rendering the doubled arrears and paying the fine. But if he fail thus to redeem within the year and day, the land shall then by judgment of court be forfeited to the lord for good and all. The land shall then be called *forschoke*, because, for default in the services, it shall remain to the lord for ever in demesne.¹

The common law will not allow forfeiture of the land for default of the tenant in performing his services or paying his rent; to effect a forfeiture it is necessary to introduce from the Roman system the writ of *cessavit per biennium*, which we have just adverted to. All that the king's court in the days of Glanvill and Bracton will permit is a *simplex namium* of the land. The lord must first distrain the chattels of the tenant; and only after this has been done may the lord get a judgment from his seignorial court permitting him to distrain the tenant by his land. By virtue of this judgment the lord is able to seize the land and to hold it as a *simplex namium*, as a means, that is, of compelling the tenant to render the arrears. The lord cannot obtain the land as a forfeiture, and he has even no right to take the profits. The tenant retains his right to redeem; and whenever he is willing and able to satisfy the claim of the lord, the lord must give back the land.²

In the law set forth by Littleton and Coke it is sometimes possible for the one entitled to rent to satisfy his claim out of the profits of the land: thus, where a feoffment is made reserving a certain rent, upon the condition that, if the rent be in arrear, the feoffor or his heir may enter and hold the land until he be satisfied or paid

¹ Cowel, Interpreter (1727), *s. v.* *Foreschoke*: "*Foreschoke (Direlictum)* signifies originally as much as *forsaken* in our modern language."

² Glanvill, IX, 8; Bracton, f. 205b, 217, 218; Bracton's Note Book, pl. 2, 270, 348, 370; Wright, Tenures 199-201; Co. Lit. 142a, n. 2; 1 Pollock and Maitland, Hist. Eng. Law 352-355. Compare Gilbert, Rents 3, 4. It is true that feoffors and feoffees may expressly agree that, on default, the feoffor may by re-entry get back the land; but such agreements are, before the middle of the thirteenth century, very rare indeed. 1 Pollock and Maitland, Hist. Eng. Law 352.

the arrears. In this case, says Coke, "when the feoffor is satisfied either by perception of the profits or by payment or tender and refusall or partly by the one and partly by the other, the feoffee may re-enter into the land."¹

The history of gages to secure loans where the debtor remains in possession of the gaged land until default, begins with the coming in of the Jews and of foreign merchants from Italy and other countries. In the centuries that immediately follow the Norman Conquest it is English policy to foster industry and commerce. Foreigners are induced to visit the realm, and it is sought to make up for deficiencies in English production by bringing in the goods of other countries. Systems of banking and insurance take root. In the interest of creditors new and more efficient processes of judicial execution are established. The Exchequer of the Jews is set up as a branch of the Great Exchequer. A system of registering debts owing to Jewish creditors and the gages that secure them is perfected, this system allowing a free buying and selling of Jewish obligations and efficient execution on default.² The needs of other creditors are supplied by giving them, on judgments or enrolled recognizances of debt, new writs of execution in addition to the old common law writs of *fiery facias* and *levary facias*; these new writs enabling the creditor to reach the lands and chattels and body of the debtor. The writ of *elegit* is introduced by the Statute of Westminster the Second for creditors generally. Merchant creditors, if they get their debtors to make recognizances of debt before courts of record or certain public officials, may obtain, on the default of their debtors, even more effective remedy. Merchant creditors may reach, among other things, not only half the land, as under the Statute of Westminster the Second, but all the land of the debtor. These merchant securities are known as "statutes merchant" and "statutes staple," the former being introduced by the Statute of Acton Burnel and the Statute of Merchants in the reign of Edward I., the latter by the Statute of the Staple under Edward III. The advantages of the merchant securities are given to all creditors by the Statute 23 Henry VIII.,

¹ Lit. § 327; Co. Lit. 202b, 203a. See Co. Lit. 205a, and marginal note (d).

² See, further, 3 Hoveden 266, 267; Bracton, f. 13, 386b; 2 Blackstone, c. 20; Plowden, Usury 95-98; Horwood, Y. B. 32-33 Ed. I., pp. xii, xlii; Jacobs, Jews of Angevin England; Gross, Exch. of the Jews (printed in 1 Publications of Anglo-Jewish Hist. Exhibition); 1 Pollock and Maitland, Hist. Eng. Law 468-475, 2 *idem* 123, 124; Rigg, Jewish Exch. (Seld. Soc.) ix-lxii; Exch. of the Jews, 18 L. Quart. Rev. 305-309.

introducing the security known as a "recognizance *in the nature of a statute staple*."¹

A gage of land with possession of the debtor to secure money obligations is therefore rendered necessary and possible by this development of credit and of processes of judicial execution; and, very largely for the benefit of the mercantile classes, an hypothecation of land may now be created by judgment and by the registration or enrolment of contracts under seal. The publicity essential to this form of gage is thereby obtained; but it should be well observed that the new security breaks in upon the old law with its restraints on alienation and its requirement that livery of seisin is necessary to the conveyance of rights in land. The old feudal polity is attacked and attacked successfully by commercialism.

The gage of lands and tenements to Jewish creditors who do not take possession arises, then, on the registration of a written contract under seal before public officials at the Jewish Exchequer or in certain towns.²

To secure principal and interest the debtor may thus hypothecate certain specific lands;³ and lands of any tenure are chargeable until the year 1234, when the Crown's demesne estates held in socage or villeinage are exempted.⁴

¹ See, further, preambles to Stat. Act. Burnel, 11 Ed. I., and Stat. Merchant, 13 Ed. I.; Coke, 2 Inst. 677-680, 4 Inst. 237, 238; Bac. Abr. tit. Execution; Comyn, Digest, tit. Obligation (K); Wright, Tenures 170-171; 2 Blackstone, c. 10, § V, c. 20, § 2, 3 *idem* c. 26, § 5, 4 *idem* c. 33, § III; 2 Reeves, Hist. Eng. Law 71, 72, 276-279, 3 *idem* 289; Coote, Mortgage, 2 ed., 66; Rogers, Indus. and Com. Hist. Eng. (1892) 71, 72; Cunningham, Eng. Indus. and Com. during Early and Middle Ages, (1896) 222, n. 3, 281-283, 290, 316, 317; Cunningham and McArthur, Eng. Indus. Hist.; 2 Pollock and Maitland, Hist. Eng. Law 203, 204, 596, 597; Brodhurst, Merchants of the Staple, 17 L. Quart. Rev. 62-74; Carter, Eng. Legal Institutions (1902) 250-270.

The forms of gage described by Glanvill and Bracton seem to be, as we have already explained, securities with immediate possession of the creditor. For the view that the gage with possession of the debtor may be found in these writers, see, however, 2 Phillips, Eng. Reichs- und Rechtsgeschichte 239, 240; 2 Glasson, Histoire du droit et des institutions de l'Angleterre 313-316; Chaplin, Story of Mortgage Law, 4 HARV. L. REV. 6 *et seq.*

² See on this system of *archae* and *rotuli* the authorities cited in n. 2, p. 43. *supra*. Compare Rigg, Jewish Exch. (Seld. Soc.), pp. xiii, xxxvii, 136 (*s. v. stallare*). On the enrolment of documents in the Great Exchequer see 1 Hall, Red Book of Exchequer, pp. xix-xxxv.

³ See Jacobs, Jews 57, 66, 67, 70-72, 99, 215, 216, 220, 221, 234; Jewish Exch. (Seld. Soc.) 45. On the gaging of rents and chirographs of debt see Jacobs 99; Jewish Exch. (Seld. Soc.) 28, 29, 33, 34, 43-45.

⁴ Rigg, Jewish Exch. (Seld. Soc.) p. xiii.

On the other hand, the gage is often in terms a gage of all the debtor's property, movable and immovable. Sometimes indeed the debtor says that, should he make default, all his goods, movable and immovable, may be distrained.¹ Apparently all such recognizances or bonds create, as regards movable property; merely a right to distrain the chattels that are in the hands of the debtor, not an hypothecation or right *in rem* that enables the creditor to follow the chattels into the hands of third persons.² We have evidence, however, that the gaging of land to Jews by registered contract gives rise to a right *in rem* for purposes of security. If the alienee of land bound by the debt refuse to pay the debt with interest, the *seisina* of the land in his hands will be given to the Jew.³

On default in payment the creditor may bring his action of Debt; and execution will be by summary processes.⁴ If his security on the land be enforced, the creditor will be given *seisina* by the court.⁵ He may either sell the lands after possession for a year and day, in which time the debtor has a chance to redeem;⁶ or, he

¹ See Jewish Exch. (Seld. Soc.) p. xix, n. 1, 33, 34, 92-94, 102; Webb, Question, App. Nos. 19, 30, 31. See further Jewish Exch. (Seld. Soc.) 67, 68, 91, 93.

² The Jewish gage of chattels seems to be a gage with immediate possession of creditor. See an article by the present writer entitled The Exchequer of the Jews, 18 L. Quart. Rev. 308. Compare Rigg, Jewish Exch. (Seld. Soc.) p. xiii.

³ See the cases in Jewish Exch. (Seld. Soc.) 18, 63; *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221; 1 Madox, Hist. Exch. 233, n. (y). Compare the case of *De Sauston v. De Senlis*, Jewish Exch. (Seld. Soc.) 53. The alienee may, however, vouch his warrantor. See the case in Jewish Exch. (Seld. Soc.) 63.

⁴ Our sources are full of actions of Debt. See, e. g., Tovey, *Anglia Judaica* 42, 43, 50; Prynn, *Demurrer*, part 2, p. 11; Cole, *Documents of 13th and 14th Centuries* 285-332; Jewish Exch. (Seld. Soc.), s. v. Debt.

The process of execution laid down by *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221, 221a, is very much like that under the Stat. West. II, c. 18.

⁵ See Jacobs, *Jews* 57, 90, 231 (and compare 233), 234; Webb, Question, App. No. 4; Bracton's Note Book, pl. 301; Plac. Abb. (Rec. Com.) p. 58; "Exchequer Receipt Roll, 1185" (with preface by Hubert Hall) 31; *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221a; Goldschmidt, *Geschichte der Juden in England* 69, n. 37; Jewish Exch. (Seld. Soc.) pp. xiii, xxxviii, n. 1, 63, and Index s. v. Seisin. Compare Rigg, Jewish Exch. (Seld. Soc.) p. xxxv. Similarly, the assignee of the Jewish creditor may obtain *seisina* of the gaged land *per praeceptum Domini Regis*. See Webb, Question, App. No. 6.

⁶ 1 Foedera 51 (see Jacobs, *Jews* 134-138); 1 Rotuli Chartarum, ed. Hardy, 93 (see also Tovey, *Ang. Jud.* 62-64, and Jacobs, *Jews* 212-214); Goldschmidt, *Juden in England* 21, 22; Rigg, Jewish Exch. (Seld. Soc.) xiii. See Webb, Question, App. No. 14. Richard I.'s *Carta quâ plurimae libertates Judeis conceduntur & confirmantur* (1190), 1 Foedera 51: Et liceat predictis Judeis quiete vendere vadia sua, postquam certum erit illos ipsa per unum annum integrum & unum diem tenuisse.

may hold the lands until he has satisfied himself out of the rents and profits.¹

While the land is in his hands the creditor has not feudal seisin, not the *seisina* of one in the scale of lords and tenants, but *seisina ut de vadio*, seisin as a gagee;² and this seisin of the Jew or of his assignee is protected by the courts.³

From the sources that have come under our notice, it is not clear whether the right of sale given by the charters of Richard I. and John indicates that the land is at the end of the year and day completely forfeited to the creditor, his title to the land being perfected by the acquiring of this right of sale,⁴ or whether the creditor is obliged to account to the debtor for the proceeds of the sale over and above the amount of the debt and interest. The answer may lurk in records of the Jewish Exchequer that are still unprinted. In the thirteenth century one would certainly expect to find an accounting in cases of sale, quite as much as in cases where the creditor is reducing his claim by taking the profits of the land.

If indeed the creditor satisfy himself out of the rents and profits, he holds the land as a *vivum vadium*. The debtor may call upon the creditor to account by the action of Account; and if the creditor has taken more than his debt and interest, this surplus belongs to the debtor. If the land be freehold, the creditor is impeachable for waste, and apparently no laches or lapse of time is pleadable in bar to an action of Account.⁵

The gage of land with possession of debtor to creditors other than Jews arises on judgment or on the enrolment of recognizances of debt before courts of record or before properly authorized public officials of towns, staples, and fairs. The judgment or recognizance under the Statute of Westminster the Second binds lands belonging to the debtor at the time of the judgment or the recognizance and also, according to later law, lands that he after-

¹ See Jewish Exch. (Seld. Soc.) xiii, xxxviii, n. 1, lvii, 19-27, 43-45, 89-91; *Chapitres Tuchaunz La Gyuerie*, Jewish Exch. (Seld. Soc.) lvi; *Les Estatutes de la Juerie*, 1 Stats. of Realm 221a; Jacobs, Jews 233.

² See Jacobs, Jews 231; Webb, Question, App. Nos. 4, 6; Rigg, Jewish Exch. (Seld. Soc.) xiii, xxxviii, n. 1.

³ See Plac. Abb. (Rec. Com.) 64, 82, 175; Bracton's Note Book, pl. 301, 1825; Jacobs, Jews 191, 234; Webb, Question, App. No. 6.

⁴ Compare 2 Pollock and Maitland, Hist. Eng. Law 90-92; Wigmore, The Pledge Idea, 10 HARV. L. REV. 335. Sometimes, by collusion with powerful personages, it was contrived to defer the redemption indefinitely, "thus compassing by sharp practice what we now call foreclosure." Rigg, Jewish Exch. (Seld. Soc.) xxxvii.

⁵ See n. 1, *supra*. The Jews were expelled from England in 1290.

wards acquires; though with the writ of *elegit*, until recent times, only a moiety of the lands may be taken from the debtor or from one who has purchased the charged land from the debtor. Under the Statute of Merchants and the other acts already referred to, the enrolled "statute" or recognizance, accompanied by the drawing up of a sealed obligation, binds in its earlier history all the lands owned by the debtor at the time of making the recognizance; and, according to later law, lands subsequently acquired by the debtor are also charged by recognizance.¹

On default in payment the creditor may bring his action of Debt on the personal obligation.² If, however, advantage be taken of the special remedies on the recognizance or "statute," possession of land bound by the lien—whether the land be now in the hands of the debtor himself, the debtor's heir who is of age or the debtor's feoffee—is delivered to the creditor, his personal representatives or assigns, to be held until the amount of the claim is levied from the rents and profits or paid outright, or until the debtor's interest in the land expires.³

¹ See Stat. Acton Burnel, 11 Ed. I.; Stat. Merc. 13 Ed. I.; Stat. West. II, 13 Ed. I., c. 18; Stat. 5 Ed. II., c. 33; 14 Ed. III., Stat. 1, c. 11; Stat. Staple, 27 Ed. III., Stat. 2, c. 9; Stat. 36 Ed. III., c. 7; Stat. 10, Hen. VI., c. 1; Stat. 23 Hen. VIII., c. 6; Stat. 32 Hen. VIII., c. 5; Stat. 2 & 3 Ed. VI., c. 31; Reg. Brev. f. 146-153, 299; Viner, Abr. *tit.* Stats. Merchant &c.; Bac. Abr. *tit.* Execution (B); 1 Ro. Abr. 311, 892; 2 Ro. Abr. 466, 472, 473; Bro. Abr. *tit.* Stat. Merc. & Stat. Staple; F. N. B. f. 266, 267 D.; Coke, 2 Inst. 395, 396, 679; Co. Lit. 289b, 290a; Wright, Tenures 170, 171; 2 Lilly, Pract. Reg. 658, 659; 2 Blackstone, c. 10, § IV., V.; 2 *idem* c. 20, 3 *idem* c. 26, § 4, 4 *idem* c. 33, § III; Co. Lit. 191a, n. VI. 9; 2 Tidd, Practice 1101, 1102; 2 Wms. Saunders, 197, n. (a), 199, n. (c), 208, n. (u), 217, n. (3), 218, n. (c); 2 Reeves, Hist. Eng. Law 96, 97, 3 *idem* 289; Williams, Real Prop. 262, 263, 266, 283, 284, 371, 372, 407, 408. On the modern law see Coote, Mortgage, 2nd ed., 68, 72, 82, 83; Williams, Real Prop. 261 *et seq.*

Quite in the spirit of the medieval law it seems that chattels, though liable in the hands of the debtor on a "statute merchant" or "statute staple," cannot be followed into the hands of purchasers. See 2 Ro. Abr. 472; Bac. Abr. *tit.* Execution (B).

² See Stat. Merc. 13 Ed. I.; Stat. 23 Hen. VIII., c. 6; F. N. B. f. 122 D; Viner, Abr. *tit.* Stat. Merc. &c.; Bro. Abr. *tit.* Stat. Marc. &c.; Bac. Abr. *tit.* Execution (B). As to a "statute staple" see, however, Viner, Abr. *tit.* Stat. Merc. &c.; 2 Lilly, Pract. Reg. 659.

³ Stat. West. II, c. 18; Stat. Merc. 13 Ed. I.; Stat. Staple, 27 Ed. III., c. 9; Y. B. 15 Ed. III., 327; Y. B. 15 Hen. VII., 16; Y. B. 2 Rich. III., 8; Y. B. 17 Ed. III., 3; Reg. Brev. f. 299; F. N. B. f. 130-132, 266 A.; F. N. B. 8 ed. 304, n. (a); 1 Ro. Abr. 311; 2 Ro. Abr. 472-475, 478; Bro. Abr. *tit.* Stat. Marc., pl. 16, 43, 49, 50; Viner, Abr. *tit.* Stat. Merc. &c.; Bac. Abr. *tit.* Execution (B); Coke, 2 Inst. 395, 396, 471, 678-680; Co. Lit. 290a; 2 Blackstone c. 10, § 5, 3 *idem* c. 26, § 4; 2 Wms. Saunders, 220, n. (3), 221, n. (3), 260, n. (6); 2 Tidd, Prac. 1083, 1084; Wms., Real Prop. 268. Compare Wms., Real Prop. 281, 282. On the judgment creditor's right of sale in modern law see Wms., Real Prop. 268.

In the enforcement of the lien, therefore, the creditor holds the land as a "gage" in the nature of the *vivum vadium*.¹ The acts and the writs framed upon them state that the creditor holds or is seised of the land *en noun de frank tenement, ut liberum tenementum*; at the same time giving him, his executor, administrator, or assign, the freeholder's possessory actions of Novel Disseisin and Redisseisin. Indeed, the Statute of the Staple explicitly declares that the merchant creditor is actually to have an "estate of freehold" (*estat de franktenement*). In legal literature the creditor in possession is referred to as a "tenant by statute," and it is said that he has an "estate by statute," a "conditional estate," an "estate defeasible on condition subsequent."² Notwithstanding all this, however, the exact legal nature of the creditor's interest in the land has not yet been fully stated.

One might be inclined to think at first sight that the intention of the medieval legislator was actually to give the creditor an estate of freehold; and from the uncertainty of the holding, which was in reality *quousque*, it would seem perhaps that these "estates by statute" ought, in strict legal theory, to have been treated as freehold estates.³ The law stopped short of this, however. The acts were interpreted to mean that the creditor has not a "freehold estate" descendible to the heir, but a "chattel real" going to the personal representative on the creditor's death.⁴ In the quaint language of Lord Coke, the *ut* of the expression *ut liberum tenementum* is merely "similitudinary," the tenant by statute having a "similitude of a freehold, but *nullum simile est idem*."⁵

The creditor's interest in the land being thus regarded by the law as a chattel real protected at the same time by the possessory actions of the freeholder, the commercial classes, for whose benefit these securities were chiefly introduced, gained thereby two very significant advantages. The holding of the creditor, his personal representatives or assignees, was perfectly secure; for, if ousted

¹ See Coke, 2 Inst. 679, note; 2 Blackstone c. 10, § IV.

² See Reg. Brev. f. 299; Rastell, Entries, 543, 545; F. N. B. f. 178 G, 189 I; 2 Ro. Abr. 475; Coke, 2 Inst. 396; 2 Blackstone c. 10, § IV., V., 3 *idem* c. 26, § 4; 2 Wms. Saunders 203, n. (1); Wms., Real. Prop. 268.

³ See Butler's note to Co. Lit. 208a; Leake, Digest 205. Compare F. N. B. f. 178 G.

⁴ 28 Ass. pl. 7; F. N. B. f. 178; Coke, 2 Inst. 396; Co. Lit. 42a, 43b; 4 Co. 82a, *Corbet's Case*; 2 Blackstone ch. 10, § V.; Butler's note to Co. Lit. 208a; Leake, Digest 205.

⁵ Co. Lit. 43b.

from the land, their seisin might be recovered by an assize.¹ Again, on the creditor's death, not only the debt but its security thus went to the creditor's executor, not to his heir; the law, says Blackstone, "judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in them, to whom the debts if recovered would belong."²

The creditor in possession has, therefore, the freeholder's possessory actions; but at the same time the debtor remains seised of his freehold estate, and should the creditor be ousted, the debtor too may bring his assize of Novel Disseisin, for he has thus been disseised of his free tenement. As soon, however, as either the debtor or the creditor recovers possession, the writ of the other shall abate.³

As soon as the amount of the creditor's claim is either levied by the creditor out of the rents and profits or paid outright by the debtor, the debtor or the feoffee of the debtor is again entitled to the land now freed from the lien.⁴ It seems that in certain very rare cases the conusor has a right of re-entry. The usual method of regaining possession, however, is by bringing a writ of *scire facias*; and by a special form of this writ the conusee may be compelled to restore the issues over and above the sum due.⁵

The medieval gage of land with possession of the debtor until default is, accordingly, either a gage of certain specific lands or a gage of all the lands of the debtor, the security being created by a contract under seal and of record.⁶ Looking at execution or the

¹ Compare Savigny's theory as to the gagee's "derived possession" (*abgeleiteter Besitz*). For the literature and a criticism of the theory see 1 Dernburg, *Pandekten* (1900) § 172. See also 2 Puchta, *Institutionen* (1893) § 229; 3 Dernburg, *Das bürgerliche Recht* (1904) § 10.

² See Stat. Merc. 13 Ed. I.; F. N. B. f. 130, 131; Co. Lit. 43b; 2 Blackstone ch. 10, § V.; Butler's note to Co. Lit. 208a. In Butler's note to Co. Lit. 208a these principles as to the nature of the tenant by statute's interest in the land are compared with the rules of Equity in regard to the classical mortgage by conditional feoffment.

³ F. N. B., 8th ed. 412, n. (e), citing 12 Hen. 6, 4.

⁴ See Stat. Merc. 13 Ed. I.; Coke, 2 Inst. 396, 678, 679; and authorities cited in n. 1, p. 47, *supra*.

⁵ See Coke, 2 Inst. 679, note; Viner, *Abr. tit.* Stat. Merc. &c. On the doctrine of Equity as to an accounting by the conusee, see Shep. Touch. 357, n. (i).

Williams, *Real Property* (1901) 226, n. (e): "Statutes merchant and staple, and recognizances in the nature of a statute staple were modes of charging lands with the payment of a debt under certain statutes, which, having long been obsolete, were repealed in 1863."

⁶ One of the most significant features of the modern development is the transformation of the old mortgage of Littleton and the classical common law into a form of

enforcement of the gage on default, we may, furthermore, classify such securities as usufruct-gage and as property-gage. The creditor may reduce his claim out of the rents and profits only; or he may be entitled to the *res* itself. The principle of the usufruct-gage underlies both gages to Jews and securities created by "statutes" or recognizances. In the right of sale given to Jewish creditors one may see the principle of the property-gage, although whether this right of sale indicates merely that the land is forfeited, or whether, on sale, the surplus must be given to the debtor, is not clear. It is, furthermore, worth observing that, should the debtor's interest in the land expire while the land is in the hands of the creditor under a "statute," there is really a forfeiture of the debtor's interest.

It will be seen, therefore, that whether the medieval creditor take immediate possession or only on default of the debtor, the principle is the same. In either case the security is a usufruct-gage or it is a property-gage, or it is indeed a combination of the two. Though the tracing of the development down to our own day lies beyond the scope of the present paper, it is believed that this very same conception lies at the basis of much of the modern English law.¹

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security where the debtor usually remains in possession until default and where, instead of foreclosure, the mortgaged land may under certain circumstances be sold, either under a power of sale or by order of the court, the surplus going to the debtor. See, further, Franken, *Französisches Pfandrecht*, 8, 9, 164-170; 5 Glasson, *Histoire du droit et des institutions de l'Angleterre*, 485; 6 *idem* 385-406; Williams, *Real Property* (1901) 527-559.

¹ In modern German law it is possible to satisfy the claim of the creditor out of the fruits of the land (*Zwangsverwaltung*) or out of the substance of the *res* itself (*Zwangsversteigerung*). See *Das Reichsgesetz über die Zwangsversteigerung und Zwangsverwaltung* of March 24, 1897, revised May 20, 1898.

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WITH the enrolment of each new class in the Law School, attention is forcibly called to the anomaly of requiring a bachelor's degree for admission, and granting only a degree of the same nature at the end of the three years course. It is hard to see any reason for discriminating between certain other graduate departments of the University and the Law School, which maintains an admittedly equivalent standard. And, as has been well said, "If the standards of a professional school are so high that graduation means the successful completion of a collegiate as well as a professional course, it is for the interest of the University to emphasize this high standard by a degree which from its form suggests that it is a second degree."

Several other law schools, including those at Stanford and Chicago universities, have already recognized the force of this reasoning. Men who have pursued three years of study in the Law School after earning a college degree ought, in justice to themselves and to the University, to be given the degree of *Juris Doctor*, or its equivalent.

THE LAW SCHOOL. — As usual there are a number of changes to be recorded. Professor Strobel and Assistant Professor Westengard are still on leave of absence in Siam. Mr. E. H. Warren, LL.B. 1900, who has been appointed an assistant professor, has taken Judge Smith's course on Corporations, and will assist Professor Beale in second year Property. As Mr. W. R. Peabody has not returned, Professor Beale will have Criminal Law alone this year. He has also consented to give the course on International Law, which it was at first planned to omit. The second year course in Equity, given by Dean Ames last year, has been taken by Assistant Professor Warren, and the Dean has resumed Equity III, which

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he will give as a half course in the first half year. He will also give Pleading, or Civil Procedure at Common Law, as it is officially called, two hours a week in the second half year, and is preparing a new case book on the subject. Professor Gray continues to give his courses in third year Property and in Evidence, but has relinquished Constitutional Law, which will be conducted by Professor Wambaugh as a half course, one hour a week. Professor Wambaugh's course on Insurance will be given by Mr. Samuel Hudson Hollis, LL.B. 1901, and Admiralty by Mr. Clarence H. Olson, LL.B. 1904. Both Mr. Hollis and Mr. Olson are former editors of the REVIEW. The course on Civil Procedure under the New York Code is announced, but it is still undecided who will conduct it. Quasi-Contracts will be omitted. Assistant Professor Wyman, who continues to give Carriers and Suretyship, has promised six lectures on "International Relations—Special Topics in the Law of Peace and War." The rest of the curriculum is the same as that of last year.

ENTRIES MADE BY A PERSON OTHER THAN THE ORIGINAL OBSERVER. — When a book is composed of entries made by a clerk from his personal observation, it can readily be used in evidence. If the clerk is alive he can testify to the transactions, using the book to refresh his recollection.¹ If he is dead the book itself is admissible as an entry made in the course of duty.² But in the course of modern business entries are seldom made by one person, being usually the result of the co-operation of two or even more. A typical case is where a foreman makes reports of transactions coming under his observation, and a clerk or book-keeper enters them in a day book. Where both these parties are alive and can testify, such a book can generally be used as evidence, the common practice being to allow the book itself to go to the jury upon their sworn testimony that the transactions were correctly observed and accurately copied.³

The difficult question arises when the original observer is not in court to testify to the correctness of his reports. Under these circumstances there is considerable conflict in regard to the admission of the book. Some courts refuse to admit the evidence at all.⁴ If, however, as is often the case, the person who reported the transaction is dead, there would seem to be no objection to admitting his report as an original declaration made by him in the course of duty, for the fact that the report first took permanent form at the hands of the book-keeper should not destroy its trustworthiness when the latter is present to testify to the correctness of his copy.⁵ The same should be true when the original observer is outside the jurisdiction, or for any other reason unavailable. Since the ground for admitting declarations in the course of duty, apart from the probability of their truth, is the impossibility of obtaining the testimony of the witness himself, it would seem of no consequence whether this impossibility is the result of death or other circumstances over which the parties have equally

¹ Greenl. Evid. 16th ed. § 439 a.

² *Nichols v. Webb*, 8 Wheat. (U. S.) 326.

³ *Mayor of New York v. Second Ave. R. R. Co.*, 102 N. Y. 576; *Hurley v. Macey*, 87 N. Y. Supp. 924.

⁴ *Kent v. Garvin*, 1 Gray (Mass.) 148.

⁵ Greenl. Evid. 16th ed. § 120 a.

little control.⁶ Accordingly many courts will admit this evidence upon proof that the original observer is unavailable.⁷

The Missouri Court of Appeals has recently handed down even a broader decision. The plaintiff's clerk kept a book of entries made from scale tickets recording the weighing of cattle. The court not only dispensed with the testimony of the persons who made the tickets, but admitted the book under the suppletory oath of the clerk, without proof that these persons were unavailable. *Drumm-Flato Com. Co. v. Derlach Bank*, 81 S. W. Rep. 503. Although such a decision as this cannot be brought within any of the exceptions to the rule against hearsay, there are a considerable number of cases which seem to go as far.⁸ It must be justified if at all on practical considerations. Taking into account the purely mechanical way in which the reports were probably made, and the improbability that the maker even if present would remember this one out of possibly one hundred similar transactions, it may be that the case is founded on common sense whether it be technically accurate or not.

THE CESTUI'S RIGHT AGAINST A TRANSFEREE FROM THE TRUSTEE.—Until the latter part of the fifteenth century it was the law that if the feoffee to uses enfeoffed another, the *cestui que use* had no remedy against the new feoffee.¹ So too if the feoffee died, the heir was seised to his own use.² The *cestui's* interest in the property was merely the personal right to call upon the trustee to convey the *res*.³ If the trustee conveyed away the property or died, in which case he could no longer perform the obligation, the *cestui's* right was destroyed. While the courts of equity subsequently gave the *cestui* greater protection, the nature of his right was not changed. They did not make his right attach to the property, for that would make it a right *in rem* and equity acted only *in personam*; but, on equitable principles, they did create new rights, in regard to this property as against subsequent holders. These rights are not based upon any artificial doctrine of notice. It is commonly said that knowledge of facts sufficient to excite an inquiry, which would lead to a discovery of certain equitable interests, charges the person with notice of these interests;⁴ and again that gross inadequacy of consideration, since it should put a purchaser upon inquiry, is sufficient to charge such purchaser with constructive notice.⁵ Yet in both these cases the purchaser seems really liable because by not exercising due care he has enabled the trustee to destroy the original right which the *cestui* had against him. So too it is said that the volunteer has constructive notice.⁶ The just decision in a New York case makes such a position untenable.⁷ A trustee died leaving the trust property to five persons in equal parts. One of these devisees bought the shares of the others, and

⁶ *North Bank v. Abbot*, 13 Pick. (Mass.) 465.

⁷ *American Surety Co. v. Pauly*, 38 U. S. App. 254.

⁸ *Fields v. Collier*, 13 Ga. 499; *Nelson v. Bank*, 32 U. S. App. 554.

¹ Note, Fitz. Ab. Subp. pl. 19, cited in Ames Cas. on Trusts, 2d ed., 282.

² Anon., Kerlw. 46 b. pl. 7, cited in Ames Cas. on Trusts, 2d ed., 282, n. 2.

³ *Watts v. Turner*, 1 Russ. & M. 634.

⁴ *Simmons, etc., Co. v. Doran*, 142 U. S. 417.

⁵ *Hume v. Ware*, 87 Tex. 380.

⁶ See Lewin on Trusts, 9th ed., 976, 977.

⁷ *Giddings v. Eastman, etc.*, 5 Paige (N. Y.) 561.

the court held that he might keep the shares he had bought but must return the part he inherited. It would be absurd to hold that the defendant had notice that the estate was held in trust when he inherited the one fifth, but that he had no notice when he bought the other four fifths. The true explanation is that equity will enforce the rights of the *cestui* against any person who has obtained the trust property wrongfully or without exercising due care, or who unjustly retains it.

If the position here maintained is sound it follows that a volunteer receiving the property with the consent of the *cestui* holds free from the trust; for the volunteer's conscience cannot be charged, since he is not enriching himself unjustly at the *cestui's* expense. The *dictum* in a recent Massachusetts case was to this effect. *Matthews v. Thompson et al.*, 71 N. E. Rep. 93 (Mass.). The court further added that this was not an assignment or surrender of an interest in land within the Rev. Laws c. 127, § 3, providing that no estate or interest in land shall be assigned, granted, or surrendered unless by an instrument in writing signed by the grantor. This statement also seems correct. Previous to the transfer, the beneficial interest in the property was in the *cestui*. Subsequent thereto, the transferee had the beneficial interest as well as the legal title. It was urged that the *cestui* must be taken to have transferred this interest. But the *cestui's* interest, which was merely a personal right to call for a conveyance from the trustee, was destroyed when the trustee conveyed the legal title to the transferee, and since, as we have seen, equity would create for him no new right, there was nothing left for him to convey.

RECORDING AS CONSTRUCTIVE NOTICE TO ONE CLAIMING NO INTEREST IN THE PROPERTY. — In this country recording acts were passed from the earliest days, and their general purpose finds a far wider scope here than in England. To prevent fraud and insure openness in dealing are the objects of such statutes. The records being easily accessible, it is evident that a failure or unwillingness to inquire into them must play a determining part in working out conflicting rights. Since *Twyne's case*,¹ decided in 1601, retention of possession by the mortgagor has given rise to a presumption of fraud, and in many states the presumption is now conclusive.² So that before the recording acts, a chattel mortgagee, who allowed the mortgaged property to remain in the mortgagor's hands was liable to have his rights cut off by an innocent purchaser or creditor.³ The recording acts gave the mortgagee, who recorded his mortgage, a right good against any one who subsequently acquired any interest in the goods from the mortgagor. This result is generally accomplished by saying that the record gives constructive notice to all the world. But to say that the filing of a mortgage gives constructive notice to all is to employ an unnecessarily broad, even a useless fiction. Was anything more purposed or effected by the mortgage recording acts, for instance, than to protect a mortgagee against subsequently acquired interests by placing knowledge within the reach of all? The whole world does not and was not intended to get notice of the recorded instrument. Thus, in several cases it has been held that a fire

¹ 3 Coke 80 b.

² See Williston's *Cas. on Bankruptcy*, 169 n.

³ *Woodward v. Gates*, 9 Vt. 358.

insurance company is not charged with notice of a recorded mortgage so as to waive a forfeiture clause for breach of condition against encumbrancing.⁴ But if the records operate as notice to all the world, the insurance companies would be charged with knowledge of the breach, where they accepted the premiums, and could not escape liability.

This question was neatly raised in a recent case where a commission merchant, ignorant of an existing mortgage on cattle, sold them and remitted the proceeds to the consignor. *Greer v. Newland*, 77 Pac. Rep. 98 (Kans.). The mortgagee recovered, in an action against the commission merchant, on a count for money had and received. The court argued that the record gave constructive notice, which is the equivalent of actual notice, and that, therefore, the defendant was in the same position as one who, knowing of a theft, sold stolen goods and gave the proceeds to the thief. Whether the defendant was liable in trover is immaterial to this discussion. But clearly the plaintiff should not be allowed to recover in quasi-contract. This claim can be sustained only on strict equitable principles.⁵ It is, surely, not equitable to construct, or, at the least, enlarge a liability on a fiction. The court properly deemed knowledge of the wrongfulness, in turning over the proceeds to the consignor, essential to a recovery. But such knowledge should not be imputed from the fact that the mortgage is recorded. The recording acts were never intended to apply to such a case. Such an unfortunate decision as this results from employing the fiction of constructive notice, instead of recognizing that recording really dispenses with the necessity of notice. This distinction was recognized, with the consequence that a contrary decision was reached, in at least one other case involving the very point here at issue.⁶

THE ATTITUDE OF BANKRUPTCY COURTS TOWARD PREFERENCES. —

Although there has been some tendency to regard bankruptcy systems as established chiefly for the benefit of unfortunate debtors, yet in the opinion of the ablest authorities, their fundamental purpose is not so much to reinstate the insolvent debtor as to secure the equitable distribution of the bankrupt estate among the creditors.¹ It is to further this end that bankruptcy statutes have provisions penalizing creditors who take and hold preferences. Section 57 *g* of the National Bankruptcy Act of 1898 stipulates that "the claims of creditors who have received preferences shall not be allowed" unless such preferences are surrendered; and section 60 *b* provides that if the person receiving the preference or to be benefited thereby has reasonable cause to believe that a preference was intended, it shall be voidable by the trustee in bankruptcy.

In interpreting these enactments, the courts have stamped preferences with their disapproval. A creditor who has received a preference on any part of any claim is prohibited not only from proving the balance of that particular claim but also from proving any claim whatsoever unless he surrenders his preference.² Moreover, by the weight of authority, not only

⁴ *Wicke v. Iowa State Insurance Co.*, 90 Iowa 4.

⁵ See *Keener*, *Quasi-Contracts* 185.

⁶ *Frizzell v. Rundle*, 12 S. W. Rep. 918 (Tenn.).

¹ See 15 HARV. L. REV. 829, 834, 843.

² *In re Conhaim*, 97 Fed. Rep. 923.

under the former National Bankruptcy Act of 1867, but more particularly under the present act, a creditor, in order to be permitted to make proof of his claim, must surrender his preference before the trustee has secured judgment against him for its amount.⁸ And if the creditor, in litigating the validity of his preference, consumes the year subsequent to the adjudication in bankruptcy, within which according to section 57 *n* all claims must be proved against the estate, a later surrender will avail him nothing.⁴

In view of these facts it is somewhat surprising to find the Supreme Court of Missouri arguing that in order to avoid a preference, the trustee must make his demand a sufficient length of time before the expiration of the year prescribed in section 57 *n* "to afford the preferred creditor a reasonable time in which to surrender the preference and exhibit his claim against the estate." *Swartz v. Frank*, 82 S. W. Rep. 60. The court takes the ground that since the preference is not void, but voidable only, the creditor is justified in retaining it until demand by the trustee, upon whom rests the burden of taking the initiative. In support of this position it is to be remembered that the trustee cannot bring an action for the property given in preference until after demand and refusal.⁵ On the other hand, there is no provision in the act which places a time limit of less than a year upon the right of the trustee to attack a preference; and with the possible exception of a case where great injustice would otherwise be effected, there can certainly be no argument in favor of interpolating stipulations by judicial decision. Preferences tend to subvert the chief object of a bankruptcy system by hindering the equitable distribution of the insolvent's assets. The Missouri doctrine would encourage them. The creditor would not only enjoy his present privilege of proving his claim after surrender of his preference upon demand; but if he could conceal his fraudulent advantage for one year, or perhaps even less, he would be absolutely safe from attack. A result so clearly opposed to the spirit of bankruptcy legislation should obviously be discountenanced by the courts.

THE RIGHT OF A PERSON TO TRADE IN HIS OWN NAME.—The enormous sale of articles obtained in recent years by extensive advertising of a trade name makes the question of one's right to the use of his own name in business of increasing importance. The writer of a recent article maintains that the law on the subject has undergone a change. *The Right of Trading in Your Own Name*, 23 Law Notes (Eng.) 205. The rule is frequently stated to be that apart from the use of an artifice in connection with a name, "everyone has the absolute right to use his own name honestly in his own business."¹ But the writer of the article referred to lays it down that the English Courts will now go further, and will restrain a person, though he be acting *bona fide*, from "using *any* name, or indeed, *any word*, in such a way as to trade on some one else's reputation." The cases cited in support of this position seem scarcely to go that far. In one case *Jamieson and Co. of Aberdeen* had established a reputation for making a

⁸ *In re Greth*, 112 Fed. Rep. 978; see Collier on Bankruptcy, 4 ed., p. 391.

⁴ *In re Rhodes*, 105 Fed. Rep. 231.

⁵ See *In re Phelps*, 3 Am. B. Rep. 396, 400-401.

¹ *Russia Cement Co. v. Lepage*, 147 Mass. 206, 208; *Turton v. Turton*, 42 Ch. D. 128.

good harness composition. The defendant, G. Jamieson, entered the business in Aberdeen under the name "G. Jamieson and Co." Due to the similarity of names alone, the defendant was getting trade intended for the plaintiff. An injunction was refused.² In another case the plaintiffs, the Valentine Meat Juice Company, had established such a wide reputation for their meat extracts under the name, "Valentine's," that the court found that that name connected with meat extracts had acquired a secondary meaning, so that customers in asking for "Valentine's" always meant the plaintiff's goods. The defendant, the Valentine Extract Company Limited, was enjoined from using the name Valentine in any way in connection with a meat extract.³ From these cases it appears that the test is, not whether the defendant is trading on the plaintiff's reputation, but whether he is doing so by "passing off" his goods as the plaintiff's. The defendant must use his name honestly in his business; he must not use it in such a way as to represent that his goods are the plaintiff's. In the ordinary case of similarity of names, he is not so doing, but when the plaintiff's name in connection with an article has acquired a secondary meaning, then it has become impossible for the defendant to sell under that name without representing his goods to be the plaintiff's.⁴ The decisions in the American cases on this subject seem to be in accord with the foregoing principles.⁵

The notion that one has a special right to use his name in business because it is his own is erroneous. Smith has as much right to enter the soap business under the name Jones and Company as Jones has.⁶ The cases cited above show that neither of them in using that name will be allowed to overstep the bounds of fair competition. It is not fair competition for a man even by the simple use of his name to pass his goods off as another's. It is not going much farther to say that it is not fair competition where the defendant, though the simple use of his name does not enable him to pass his goods off as the plaintiff's, is nevertheless, as in the Jamieson case, trading on the plaintiff's reputation. It is not fair to the plaintiff who established the reputation, nor to the public who are led to make the natural mistake of buying from the wrong man. On principle, then, the broad rule laid down in the article, that no one shall use any name so as to trade on someone else's reputation, seems desirable.

NECESSARY PARTIES.—The rules governing the joinder of parties as administered by the common law courts seem to be based upon the technical position of the parties rather than upon the actual interests involved.¹ Equity, however, adopts a broader principle and requires as parties all persons in any way interested in the result of the suit.² This is but an example of the desire of equity to do justice on the merits of each case, and by having all the parties before it make its decree a final adjudication

² Jamieson and Co. v. Jamieson, 15 Rep. Pat. Cas. 169.

³ Valentine Meat Juice Co. v. Valentine Extract Co. Limited, 83 L. T. R. 259.

⁴ J. and J. Cash Limited v. Joseph Cash, 86 L. T. R. 211.

⁵ Singer Manufacturing Co. v. June Manufacturing Co., 163 U. S. 169; Walter Baker and Co. v. Baker, 77 Fed. Rep. 181.

⁶ See Hopkins, Unfair Trade, § 51.

¹ Story Eq. Pl. 10th ed. § 76.

² Cockburn v. Thompson, 16 Ves. Jr. 325.

on the whole subject.⁸ This general rule is, however, relaxed in the case of parties having a merely formal interest in the controversy, the joinder of such parties only encumbering the record, and not materially aiding the settlement of the case.⁴ Moreover, if parties having even an actual interest are inaccessible, as when they are without the jurisdiction, the court will often go far to settle the controversy between the parties before it,⁵ especially if it appears that a strict adherence to the rule would lead to a failure of justice.⁶ On the other hand, in its endeavor to do justice in the case before it the court cannot trench upon the principle common both to courts of equity and law that they cannot finally settle the rights of individuals not before them.⁷ Just how far a court can go in dispensing with parties who would ordinarily be necessary is a difficult question. Thus a suit has been allowed against one of several partners, the others being without the jurisdiction, on the ground that the claims of the litigants could be settled without prejudicing the rights of the absent parties;⁸ while in a similar suit against one of several part owners of a vessel, the court dismissed the suit on the ground that no just settlement could be made in the absence of the other owners.⁹

The frequency with which this question has arisen has led to many attempts to lay down fixed rules for the exercise of the courts' discretion, and accordingly several attempts to classify parties who can and who cannot be dispensed with have been made, based on the separability of their interests.¹⁰ The danger of any rigid rule is illustrated by a contemporary New Jersey decision. A bill was brought in New Jersey by a stockholder in a Maine corporation alleging that the defendant, a New Jersey corporation, was, by virtue of an agreement with the Maine corporation, in possession of a large portion of its assets, and that the defendant had violated its agreement and was about to transfer these to a New York corporation. The bill prayed that such transfer be restrained. It had already been decided that the court had no jurisdiction over the New York corporation,¹¹ and it was now moved to dismiss the suit on the ground that the New York corporation was an indispensable party defendant. The court dismissed this motion. *Wilson v. American Palace Car Co.*, 58 Atl. Rep. 195. Since the New York corporation was to be the direct recipient of the assets in question, it would seem to be sufficiently interested in a suit to restrain their transfer to constitute it an indispensable party under the attempted classifications above referred to.¹² It seems clear, however, that in this particular instance more justice would be done by proceeding to settle the controversy between the Maine and New Jersey corporation, since the New York corporation could easily have appeared at the trial had it considered its interests worth protecting. The decision shows that a fixed rule is impracticable, and that each case must be left to the discretion of the court, with the one limitation that the interests of absent persons must not be seriously prejudiced.

⁸ *Poor v. Clark*, 2 Atk. 515.

⁴ *Cockburn v. Thompson*, *supra*. Here the number of parties was extremely large.

⁵ 1 Daniels Chan. Pl. & Prac. 150.

⁶ Per Lord Cottenham, in *Mare v. Malachy*, 1 Myl. & Cr. 559.

⁷ *Burnham v. Kempton*, 37 N. H. 485.

⁸ *Darwent v. Walton*, 2 Atk. 510; see *Lawrence v. Rokes*, 53 Me. 110.

⁹ *Nudgett v. Gager*, 52 Me. 541.

¹⁰ *Shields v. Barrows*, 17 How. (U. S.) 130.

¹¹ *Wilson v. American Palace Car Co.*, 55 Atl. Rep. 997.

¹² *Lawrence v. Rokes*, *supra*; *Chadbourne v. Coe*, 10 U. S. App. Cas. 78.

COMPOSITIONS WITH CREDITORS. — Although a payment to one creditor of a less sum in discharge of a greater, is not a valid accord and satisfaction,¹ yet an agreement with two or more creditors providing for the payment of part of the debt in satisfaction of the whole, is a good composition discharging the whole liability, as the promise of each of the creditors to forego part of his debt furnishes a good consideration for the promises of the other creditors.² Thus an insolvent debtor by a composition with all his creditors, could discharge his liability without the aid of any bankruptcy statute. As the satisfaction of the debts was by voluntary agreement, and not by operation of law, as in case of a debt barred by the Statute of Limitations³ or by a discharge in bankruptcy,⁴ there was no moral obligation on which to found a new promise. So a debt once discharged by a composition could not be revived by a subsequent promise.²

By the provisions of the Bankruptcy Act of 1898, giving the bankruptcy courts supervision over compositions, it is provided that a court may confirm a composition assented to by a majority of the creditors,⁵ and such a composition is binding on them all.⁶ Under these circumstances, it was recently assumed that a subsequent promise would not revive the balance of a discharged liability, where all the creditors assented to a composition. *Taylor v. Skiles*, 81 S. W. Rep. 1258 (Tenn.).

It may well be urged in support of the above assumption that, although the composition took effect under the terms of the act, it was none the less a voluntary agreement, that such voluntary agreement was a condition precedent to the operation of the act, and that the creditors had a choice between volunteering and letting the bankruptcy proceedings take their course. The weight of authority however seems to be against these arguments. Not only are there decisions contrary to the principal case,⁷ but even where only a majority assented and the subsequent promise was to one of the majority, the discharge was held to be by operation of law.⁸ Where the terms are accepted only by the majority, obviously the law discharges the debts owed to the dissenting creditors, for they are in no sense parties to a voluntary agreement. Even where all the creditors assent, their assent can hardly be called wholly voluntary. For it is by no means obvious that all would have assented, had there been no statute governing the subject. The fact that a majority assenting could force the composition upon the remainder would have a strong tendency to compel the latter to submit when they realized that resistance would be useless. The case remains the same where a subsequent promise is made to one of the assenting majority. The statute merely gives them the choice of assenting to a composition or of awaiting the regular bankruptcy proceedings. Each method reaches the same result, a discharge, and each is provided by law. The assent of the majority is merely the choice of the swifter form of discharge in preference to the slower. It seems, therefore, that the justice of the decision in the principal case is doubtful, and that the majority of courts are justified in holding that a subsequent promise after a composition

¹ *Foakes v. Beer*, 9 App. Cas. 605.

² *Warren v. Whitney*, 24 Me. 561.

³ *Pittman v. Elder*, 76 Ga. 371.

⁴ *Badger v. Gilmore*, 33 N. H. 361.

⁵ 30 Statutes at Large, 544, § 12.

⁶ See *In re Bjornstad*, 5 Fed. Rep. 791.

⁷ *In re Merriman's Estate*, 44 Conn. 587.

⁸ *Higgins v. Dale*, 28 Minn. 126.

will revive the balance of the old liability, on the ground that such composition is merely one form of bankruptcy proceedings under the National Act.

THE EFFECT OF JUDGMENTS BY CONSENT.—There is some difference of opinion among the authorities as to the consequence of a judgment by consent. Some courts refuse to give it the effect of a judgment *in invitum*, and admit the judgment record only as evidence of the agreement reached by the parties.¹ The basis of this position is the theory that no matter upon which the court has not exercised its judicial mind by determining the respective rights of the litigants and pronouncing judgment accordingly can be considered *res judicata*. As a matter of definition, this proposition is scarcely open to question. The real gist of the controversy has been settled by the act of the parties while the court in entering up judgment has performed merely a ministerial function. On the other hand, the parties have caused the court to place their deliberate agreement upon the record as a formal judgment; and except in case of mistake or fraud, it would seem that they should be estopped from later denying it, even though the strict principles of *res judicata* are not applicable.² In fact the majority of jurisdictions disregard the argument of definition and hold the judgment binding upon the parties according to its terms.³ The original cause of action is considered merged in the judgment, and to a later suit between the same parties on the same subject-matter a plea of *res judicata* is a complete defense.

Where, however, the action is simply dismissed by the consent of the parties, there is not the same ground for the argument of estoppel. The terms of the agreement which culminated in the dismissal do not appear in the judgment. The words of the judgment record, "dismissed agreed," are capable of several interpretations. Some courts give to them the effect of the old common law *retraxit*, which is defined as an open and voluntary renunciation by the plaintiff of his suit in court by which he forever loses his cause of action.⁴ Others reach the same result by holding that they necessarily imply that the parties have adjusted their differences and merged their cause of action in the judgment of dismissal.⁵ The Supreme Court of Tennessee recently endorsed the third view that the record is plain and unequivocal and leaves no room for construction.⁶ *Lindsay v. Allen*, 82 S. W. Rep. 171. It states only that the parties have agreed to a dismissal and nothing more. Consequently it leaves them in the same position as before the commencement of the litigation. The question seems to be strictly one of intention of the parties as shown by the judgment record. Have they agreed upon renunciation of all claim of right, or upon merger of the cause of action in the judgment, or upon a simple dismissal of the suit without impairing any existing rights? Any one of the three is possible; but the last seems the most natural interpretation, for it is certainly a harsh rule that deprives a person of rights which he has not renounced expressly or by necessary implication.

¹ *Jenkins v. Robertson*, L. R. 1 H. L. Sc. 117, 122.

² See *Kelly v. Town of Milan*, 21 Fed. Rep. 842, 863.

³ *Nashville, etc., Ry. Co. v. United States*, 113 U. S. 261.

⁴ *Hoover v. Mitchell*, 25 Grat. (Va.) 387.

⁵ *Bank of Commonwealth v. Hopkins*, 2 Dana (Ky.) 395.

⁶ *Bishop v. McGillis*, 82 Wis. 120.

RESCISSION FOR BREACH OF CONTRACT WITHOUT REPUDIATION. — The weight of English authority is to the effect that while acts indicating an intention to abandon a contract justify the aggrieved party in rescinding, mere breach in performance, without repudiation, cannot warrant rescission.¹ A recent *dictum*, to the same effect, in an Australian case following an earlier decision in the same jurisdiction,² is indicative of the tendency of the provincial courts to adhere implicitly to the English doctrine. *Moroney v. Roughan*, 29 Victorian L. Rep. 541. It has been pointed out in an earlier volume that the real reason the aggrieved party is ever allowed to rescind, lies in the other's failure to do what he promised, rather than in what he thinks or says, so that the English rule is hardly logical in making the right to rescind dependent wholly on whether or not the defaulting party intends to abandon his contract.³

An English case decided in 1859 allowed rescission on the ground of insufficient delivery of the first instalment of an iron contract.⁴ This doctrine has given way in England to that of the more recent cases noted above, but it has been very generally followed in the United States, and has been extended even to cases where the breach was not *in limine*.⁵ In fact, rescission is often allowed for comparatively slight delay, provided notice is at once given by the innocent party of his intention to abandon the contract.⁶ While avoiding the undue strictness of the English courts in requiring that an intention to put an end to the contract must be shown if rescission is to be permitted, it is possible that our courts go too far in the opposite direction, and tend to allow rescission for too insignificant a breach. Thus it has been held in the Circuit Court of Appeals that where, under a year's contract for furnishing coke, payment was to be made on the twentieth of each month for the deliveries of the preceding month, the party to whom the money was payable might rescind the contract on the twenty-third, if the sum was still unpaid.⁷ There are of course many cases where the breach is so serious that the only solution fair to the innocent party is to allow rescission. But in the ordinary case of delayed performance, although the law should allow the innocent party to postpone the execution of his own promises until the other's obligations are performed, it is only fair that absolute cancellation be delayed until the breach has become material. To allow either party, on a comparatively unimportant deviation by the other from the terms of the contract, the choice between enforcing or avoiding it, according as the state of the market makes it profitable or unprofitable for him, is too severe a penalty to impose on one in slight default. It seems clear that rescission should be allowed for failure to perform as well as for repudiation, but only when the breach is material.

¹ *Freeth v. Burr*, L. R. 9 C. P. 208; *Cornwall v. Henson*, [1900] 2 Ch. 298.

² *Bradley v. Bartoumieux*, 17 Victorian L. Rep. 144.

³ 14 HARV. L. REV. 317, 324, n.

⁴ *Hoare v. Rennie*, 5 H. & N. 19.

⁵ *Norrington v. Wright*, 115 U. S. 188; *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92. But see *Gerli v. Poidebard Silk Co.*, 57 N. J. Law 432.

⁶ *Rugg & Bryan v. Moore*, 110 Pa. St. 236.

⁷ *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. Rep. 256.

RECENT CASES.

ADVERSE POSSESSION—CONTINUITY—GRANTEE OF ONE HAVING TITLE BY ADVERSE POSSESSION.—The plaintiff's grantor occupied, together with his own land, a strip adjoining, to which the defendant now holds the paper title. After adverse possession of the strip for more than the statutory period, the plaintiff's grantor gave possession of the whole tract to the plaintiff, executing a deed which failed to include the added strip, although both parties intended its conveyance. *Held*, that the plaintiff may maintain an action to quiet title. *Clithero v. Fenner*, 99 N. W. Rep. 1027 (Wis.).

The court apparently relies on the general rule that where one in adverse possession transfers his rights to another, the transferee acquires title when the combined length of his own and the previous terms of adverse possession reaches the statutory period. *Cf. McNeely v. Langan*, 22 Oh. St. 32; *Davock v. Nealon*, 58 N. J. Law 21. In the present case, however, the plaintiff's grantor had acquired title before the transfer, by his adverse possession. *Schall v. Williams Valley R. R. Co.*, 35 Pa. St. 191. Since the legal title thus became vested, the plaintiff no longer had any claim based on his own possession adverse to the holder of the paper title. Nor did the plaintiff acquire the legal title by the conveyance. The strip was not described in the deed, nor could it pass as appurtenant to the other land. *New Orleans, etc., Ry. Co. v. Parker*, 143 U. S. 42. A number of states have passed statutes permitting the holder of a merely equitable title to maintain an action to quiet title, but no such statute being in force in Wisconsin, it would seem that the defendant should have had judgment.

BANKRUPTCY—COMPOSITIONS.—The Bankruptcy Act of 1898 provides that the bankruptcy courts may confirm a composition assented to by the majority of creditors. *Seemle*, that where the composition is assented to by all the creditors a subsequent promise will not revive the balance of the old liability. *Taylor v. Skiles*, 81 S. W. Rep. 1258 (Tenn.). See NOTES, p. 59.

BANKRUPTCY—PETITIONS IN BANKRUPTCY: INVOLUNTARY PROCEEDINGS—COMPUTING NUMBER OF CREDITORS.—The assignee under a general assignment, to which a large number of creditors assented, bought up twelve claims which he re-assigned to different persons, to keep alive enough claims to defeat the provision of section 59 b of the Bankruptcy Act permitting one of the creditors, when there are less than twelve, to petition in involuntary bankruptcy. *Held*, that the creditors thus created are excluded in computing the number of creditors under this clause. *Leighton v. Kennedy*, 129 Fed. Rep. 737 (C. C. A., First Circ.).

Courts generally invalidate attempts to frustrate the purpose of bankruptcy legislation. It is clearly the intent of the Bankruptcy Act not to allow the bankrupt or his assignee to deprive a creditor of his right to petition by creating new friendly creditors through re-assignments of purchased claims. Such colorable proceedings would practically nullify the provision in favor of one creditor. A similar move to obtain the requisite number of petitioners by splitting up one claim failed. *In re Independent Thread Co.*, 113 Fed. Rep. 998. And while a creditor has been permitted to buy up claims to bring himself within the statutory requirements, the present decision, under the existing authorities, seems sound. *Cf. In re Woodford and Chamberlain*, 13 N. B. Rep. 575. Another contention might have been made. It has been held that creditors assenting to a general assignment are not creditors within section 59 b *supra*. *In re Miner*, 104 Fed. Rep. 520. That question, however, is still doubtful, and assuming, as seems probable, that the number of such creditors in this case was at least twelve, the appellant might have contended that that section should not apply. See 14 HARV. L. REV. 461.

BANKRUPTCY—PREFERENCES—TIME WITHIN WHICH TRUSTEE MUST SUE TO AVOID.—*Seemle*, that in order to avoid a preference, the trustee must make his demand a sufficient length of time before the expiration of the year within which all claims must be proved against the bankrupt estate, to afford the preferred creditor a reasonable time in which to surrender the preference and exhibit his claim against the estate. *Swartz v. Frank*, 82 S. W. Rep. 60 (Mo., Sup. Ct.) See NOTES, p. 55.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — BANKRUPT A CONSTRUCTIVE TRUSTEE OF CONCEALED ASSETS. — The plaintiff secured a discharge in bankruptcy without the appointment of a trustee, as he disclosed no assets. He then sued on a claim that he erroneously but honestly failed to disclose at the time of the discharge. A statute provided that only the real party in interest might sue. *Held*, that the plaintiff cannot maintain his action. *Rand v. Iowa Central Ry. Co.*, 96 N. Y. App. Div. 413.

This case involves in a novel way the relation of a bankrupt to assets discovered after his discharge and the close of his estate. Under subdivision eight of section two of the Bankruptcy Act of 1898, a bankrupt, or a creditor who took part in the former proceedings, may petition the court to reopen the estate to administer newly discovered assets, without disturbing the discharge. *In re Shaffer*, 104 Fed. Rep. 982 (*semble*); *In re Newton*, 107 Fed. Rep. 429 (*semble*). On the basis of this recognition of the clear right of creditors to reach these assets, the New York court seems justified in making the bankrupt a constructive trustee of them. It seems clear that the entire beneficial interest is in the creditors; the bankrupt has only a dry legal title. Accordingly he is not entitled to sue as the real party in interest.

CARRIERS — DUTY TO TRANSPORT AND DELIVER — WAIVER OF RIGHT TO DEMAND BILL OF LADING. — The defendant, a carrier, refused to accept the plaintiff's tender of freight charges and to deliver certain goods to him, claiming excessive freight. At that time the latter did not have the bill of lading, but later obtained and presented it and was given the goods, which had in the meantime been damaged by frost. The plaintiff sued for damages. *Held*, that the defendant cannot set up the plaintiff's failure to present the bill of lading. *Clegg v. Southern Ry. Co.*, 47 S. E. Rep. 667 (N. C.).

Where tender of performance of an act is necessary to acquire a right of action, but the party to whom tender is due shows by his conduct that he would not accept it, the prevailing view seems to be that such tender is waived. *Sonia, etc., Co. v. Steamer Red River*, 106 La. Ann. 42; *Keller v. Fisher*, 7 Ind. 718. By analogy it may be urged that the defendant waived his right to insist on the presentation of the bill of lading, since his conduct fairly indicated that, even if it had been produced, he would still have refused to deliver. Furthermore, the case seems to be within the principle that where tender of performance is refused on one ground, such refusal cannot later be defended on another ground. *Poglass v. Oliver*, 2 C. & J. 15. If the defendant had required a bill of lading instead of insisting solely upon the payment of excessive charges, the plaintiff might at once have obtained the bill. The plaintiff's failure to fulfill all requirements, then, fairly resulted from the defendant's conduct, and the latter should not be allowed to take advantage of that failure. *Louisville, etc., R. R. Co. v. McGuire & Co.*, 79 Ala. 395.

CHATTEL MORTGAGES — NOTICE UNDER THE RECORDING ACTS. — A commission merchant sold mortgaged cattle and remitted the proceeds of the sale to the consignor, without actual knowledge of the existence of the mortgage, which was recorded. The mortgagee sought to recover the amount of the net proceeds from the commission merchant in an action for money had and received. *Held*, that the plaintiff may recover. *Greer v. Newland*, 77 Pac. Rep. 98 (Kan.). See NOTES, p. 54.

CHOSES IN ACTION — MANNER AND EFFECT OF ASSIGNMENT — EFFECT OF STATUTE. — A statute provided that the real party in interest must sue. *Held*, that the partial assignee of a chose in action may join with the assignor in an action at law against the obligor. *Firemen's, etc., Co. v. Oregon, etc., Co.*, 76 Pac. Rep. 1075 (Ore.).

Courts of law refuse to allow an action by a partial assignee for two reasons: first, that at law no divided judgment can be pronounced; second, that to allow him a separate action would subject the obligor to more than one suit. *Mandeville v. Welch*, 5 Wheat. (U. S.) 277. Equity, however, everywhere protects the partial assignee. The statute providing that the real party in interest must sue did not remove the difficulty as to the number of parties to an action at law. The court in the principal case followed the *dicta* in two previous cases. See *State, etc., Co. v. Oregon, etc., Co.*, 20 Ore. 563; *Home, etc., Co. v. Oregon, etc., Co.*, 20 Ore. 569. These *dicta* were based upon decisions in New York and Wisconsin, where law and equity are administered in one forum without regard to the form of the action. In Oregon the two courts are distinct. In New Jersey, under a similar statute, the court reached the opposite result. *Otis v. Adams*, 56 N. J. Law 38. Since, under such statutes, misjoinder of parties has been held fatal, the decision is also opposed to those cases, arising under them, which hold that the assignor may sue without joining the assignee. *Leese v. Sherwood*, 21 Cal. 151.

CONFLICT OF LAWS — JURISDICTION — RIGHT ACQUIRED UNDER FOREIGN STATUTE. — A citizen of the United States was killed in Mexico through the negligence of the defendant, a Colorado corporation. Under the Mexican statute giving an action for death by wrongful act, the liability of the defendant was limited to furnishing support to the legal dependents of the deceased during the periods of time that support would have been due from him, payments being made in monthly instalments. Action was brought under this statute by the proper parties in the United States Circuit Court. *Held*, that the federal court has no jurisdiction. *Slater v. Mexican, etc., R. R. Co.*, 194 U. S. 120.

For a discussion of this case, see 16 HARV. L. REV. 63.

CONFUSION — ACCOUNTS — FRAUD BY LESSEE. — A company leased the natural gas privileges from the plaintiff's land, contracting to pay him one-quarter of the profits therefrom. The lessees fraudulently mixed this gas with that from other properties, and declared themselves unable to determine what proportion of the mixture had come from the plaintiff's property. *Held*, on a bill for an accounting, that the company is liable for one-fourth of the profits on the whole of the mingled gas. *Stone v. Marshall Oil Co.*, 208 Pa. St. 85.

The principle relied on by the court in estimating the amount of the plaintiff's recovery applies both in law and in equity. Whenever there is fraudulent confusion, either of property or accounts, without means of determining the share of each party, the innocent owner will be protected, at whatever risk to the rights of the confuser. *Diversey v. Johnson*, 93 Ill. 547; *Graham v. Plate*, 40 Cal. 593. In the present case, the only settlement which involved no danger of injustice to the innocent plaintiff was the one adopted. *Cf. Kleppner v. Lemon*, 197 Pa. St. 430. In the corresponding cases involving ownership rather than accounting, the decisions merely vindicate the innocent owner's right to take and keep the whole until the confuser designates his share. When the question of damages for conversion of such a mass does arise without data as to the proportions belonging to the interested parties, there is little doubt that the full value of the mixture will be awarded. The present analogous case in confusion of accounts appears to support this view.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — EXCLUSION OF ALIENS AS A JUDICIAL QUESTION. — The petitioners, Chinese persons, applied for admission to the United States, but were refused admission and detained by the immigration officers on the ground that they were not citizens of the United States and not within the classes entitled to admission. The petitioners refused to answer the questions asked by the officers or to appeal to the Secretary of Commerce and Labor, as allowed by the statute, but instead applied for discharge from custody on *habeas corpus*, alleging citizenship. *Held*, that the petition must be dismissed and the petitioners remanded. *United States v. Sing Tuck*, 194 U. S. 161.

This decision of the supreme court overrules that of the circuit court of appeals and affirms that of the circuit court. For a discussion of the principles involved, see 17 HARV. L. REV. 488.

CONTRACTS — DEFENSES — PERFORMANCE RENDERED IMPOSSIBLE BY LAW. — The lessee of an electric car line belonging to a municipal corporation contracted to allow an advertiser the exclusive right of advertising in its cars for a certain time. At the instance of the lessee, a clause empowering the corporation to take over its lines was inserted into an act of Parliament. The corporation exercised its power, and thereby made performance of the advertising contract impossible. *Held*, that the lessee is liable on the contract. *Re Companies' Acts*, 117 L. T. 60 (Eng., Ch. D.).

The present decision apparently creates a new modification of an old legal principle. It is generally held that when performance of a contract is rendered impossible by law the promisor is excused. *Bailey v. De Crespigny*, L. R. 4 Q. B. 180. But in the present case the defendant was not allowed to plead, as an excuse for not performing its contract, a law which it had caused to be introduced into Parliament, and which rendered performance impossible. This result seems sound. The case is analogous to those in which the subject matter of a contract has been destroyed by the defendant. Under such circumstances, the courts have held that he cannot successfully plead facts which would otherwise have afforded him an excuse. *Cf. Stanton v. New York, etc., R. R. Co.*, 59 Conn. 272. That the defendant created the impossibility by means of an act of Parliament should not affect the validity of the analogy. The argument in both instances is based upon the same rule of common sense, that no one should be allowed to take advantage of his own wrong to the injury of another.

CONTRACTS — RESCISSION — ACTION FOR RESTITUTION. — The plaintiff contracted to sell a tract of land to the defendant, who paid £100 cash and agreed to pay

the balance of the purchase price in specified instalments. The first instalment was offered by the defendant four days after the date set by the contract. An agreement postponing payment had been made, and the evidence was conflicting as to whether the time had been extended to the date of the defendant's tender. The plaintiff asked restitution and damages. *Semble*, that delay in paying one instalment of a contract is not ground for rescission, unless an intention to repudiate has been manifested by the party in default. *Moroney v. Roughan*, 29 Victorian L. Rep. 541. See NOTES, p. 61.

CRIMINAL LAW — ACQUIESCENCE FOR DETECTION. — The defendant plotted to obtain certain indictments by bribery and to destroy them. The district attorney, for the purpose of apprehending the defendant in the commission of crime, instructed his employees to accept the defendant's proposition and to deliver the indictments in return for a consideration. The defendant was indicted for an attempt to obtain documents from an official unlawfully and to commit grand larceny. *Held*, that the defendant is guilty. *People v. Mills*, 178 N. Y. 274.

It seems well settled that when government officials suggest and originate the crime in order to prosecute, there can be no conviction of the offender. *United States v. Adams*, 59 Fed. Rep. 674. Where they have merely made the perpetration of the criminal act possible or easy the tendency undoubtedly is to hold the defendant for that act. The principal case has no precedent in New York, but the court takes the position that since a public officer in such circumstances acts in excess of his authority his official position is immaterial, and the right of the state to punish is not affected. A like decision has been reached in Michigan. *People v. Liphardt*, 105 Mich. 80. The reasoning of these cases would go far toward removing all disability resting upon the state as the result of the encouragement of crime by its agents. It is submitted that the question of most importance in such cases is not whether the officer exceeds his authority, but how far the state is willing to countenance the use by its agents of such methods of procuring a conviction. See *Saunders v. People*, 38 Mich. 218.

EQUITY — PROCEDURE — NECESSARY PARTIES TO SUIT. — A bill was brought in New Jersey by a stockholder in a Maine corporation alleging that the defendant, a New Jersey corporation, was by virtue of an agreement with the former corporation in possession of a large portion of its assets which it was about to transfer to a New York corporation and asking an injunction to restrain such transfer. It had already been decided that the court had no jurisdiction over the New York corporation, and it was now moved to dismiss the suit on the ground that the latter was a necessary party defendant. *Held*, that the motion be dismissed. *Wilson v. American, etc., Co.*, 58 Atl. Rep. 195 (N. J., Sup. Ct.). See NOTES, p. 57.

EVIDENCE — CONFESSIONS — CRIMINATING STATEMENTS. — The defendant, charged with murder, was subjected at the inquest to a rigid cross-examination by the county attorney, during the course of which he made this statement, "I may have done it, but I don't know anything about it. My mind is a perfect blank." At the trial this was admitted in evidence. *Held*, that the statement was not freely and voluntarily made, and should not have been admitted. *Parker v. State*, 80 S. W. Rep. 1008 (Tex., Cr. App.).

According to the common restriction of confessions to acknowledgments of guilt, the words quoted amount merely to a criminating statement; for they expressly negative the criminal intent. See *People v. Parton*, 49 Cal. 632. As to whether the test of admissibility usually reserved for confessions — that they must be voluntary — should be extended to such statements, the authority, though slight, is in conflict. See *People v. Hickman*, 113 Cal. 80; *Fletcher v. State*, 90 Ga. 468. If, however, the extension of the rule be approved, the propriety of its application here may still be questioned. See *Commonwealth v. Cuffee*, 108 Mass. 285. The real basis of the rule requiring that confessions to be admissible must have been voluntary, is the desire to secure reliable evidence, and not any idea of indulgence to the defendant; and it would seem that in most cases confessions elicited in cross examination would be sufficiently free from undue influence. The practice of admitting at trials confessions made at preliminary examinations, supports this view. *Wilson v. United States*, 162 U. S. 613. Conceivably, however, in extreme cases, the accused might through alarm or nervousness be led into making untrustworthy statements; and upon this ground the principal case may possibly be supported. See *Gallagher v. State*, 40 Tex. Cr. Rep. 296.

EVIDENCE — DECLARATIONS AGAINST INTEREST — ADMISSIBILITY TO CONTRADICT RECORD TITLE. — The defendant's predecessor in title of certain land, while in possession under a deed purporting to be made by A, stated that the deed was forged. The defendant's title, however, was good of record. After the declarant's death, in a

suit to recover the land brought by the plaintiffs as heirs of A, the above statement was admitted in evidence to contradict the defendant's title. *Held*, that a new trial be granted. *Phillips v. Laughlin*, 58 Atl. Rep. 64 (Me.).

The court proceeds partly upon the ground that admissions by a privy in estate are not receivable in evidence to contradict a record title. That the weight of authority is in support of this proposition cannot be doubted. *Gibney v. Marchay*, 34 N. Y. 301. Nevertheless, the decision seems contrary to the general principles of the law of evidence. In favor of the decision, it is argued that the policy of our recording laws demands that *bona fide* purchasers should have a right to rely upon the record as showing the exact facts. See *Cook v. Knowles*, 38 Mich. 316, 330. On the other hand, it has been held repeatedly that where an innocent purchaser buys land from a grantee who has fraudulently procured a deed from one with whom it had been deposited in escrow and has placed the same on record, he acquires no title. *Everts v. Agnes*, 6 Wis. 453. So here it seems clear that if the deed to the defendant's grantor was forged, the defendant never acquired title; and that any fact tending to prove such forgery was entirely relevant to the issue. The evidence offered did tend to prove such forgery, and, regarded either as an admission or as a declaration against interest, came within the exceptions to the hearsay rule. *Cf. Dickerson v. Chrisman*, 28 Mo. 134; *Currier v. Gale*, 14 Gray (Mass.) 504.

EVIDENCE — DEEDS — PERFORMANCE OF CONDITIONS OF ESCROW. — In a suit in equity under a statute, the plaintiff alleged that the defendant had obtained possession of a deed delivered by the former in escrow, without performing the conditions, under which he was claiming; and prayed a declaration by the court that the plaintiff's title be adjudged good. The defendant alleged performance of the terms of the escrow. After the plaintiff had introduced in evidence a copy of the deed conveying the premises to him, and documents tending to prove the defendant irregularly in possession of his conveyance, a nonsuit was granted. *Held*, that the burden of proof is upon the plaintiff to show non-performance of the conditions. *Swain v. McMillan*, 76 Pac. Rep. 943 (Mont.).

There is authority in conflict with the proposition here broadly laid down. *Black v. Shreve*, 13 N. J. Eq. 455. The question as to burden of proof is properly dependent upon the pleadings and substantive law in the particular case. See THAYER, *PREL. TREAT. EV.* 371. The rule, as usually stated, is to the effect that he has the burden who has the affirmative of an issue to maintain. *Central Bridge Co. v. Butler*, 2 Gray (Mass.) 130. To apply this test it is necessary to determine in every instance the essential allegations in each party's case and pleading. The case under discussion being practically a statutory modification of a bill to quiet title, the plaintiff makes all essential allegations when he avers his own title and the defendant's adverse claim; it is then for the defendant to plead and prove his title. See *Ely v. New Mexico, etc., R. R.*, 129 U. S. 292. And as a deed in escrow delivered without performance of conditions is null, the defendant should prove performance. Possession by the grantee is, however, *prima facie* evidence of such performance, and the case may be supported upon the theory that the plaintiff's evidence did not rebut this presumption. See *Hare v. Horton*, 2 Nev. & M. 428.

EVIDENCE — ENTRIES MADE BY A PERSON OTHER THAN THE ORIGINAL OBSERVER. — A book composed of entries made by the plaintiff's clerk from scale tickets recording the weighing of cattle was offered in evidence under the oath of the clerk. *Held*, that the evidence is admissible. *Drumm-Flato Com. Co. v. Derlach Bank*, 81 S. W. Rep. 503 (Mo., Ct. App.). See NOTES, p. 52.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST EXECUTORS — CONTINGENT CLAIMS. — A testator during his life assigned certain leasehold properties. There remained a contingent liability on certain covenants in the leases. The executors sought to hold back a large fund from the residuary legatees to protect the lessors. *Held*, that the executors must turn over the money to the residuary legatees. *In re Nixon*, [1904] 1 Ch. 638.

There are two possible grounds for setting aside the assets: first, to indemnify the executors, second, to protect the lessors. Assets are not set aside to indemnify executors, for it is an acknowledged principle that a decree of the court, directing an executor who has disclosed all facts to distribute the property, relieves him from liability. *Dean v. Allen*, 20 Beav. 1. The second ground has not been favored in England. *Dodson v. Sammell*, 1 Drew. & Sm. 575. Conversely, courts have held that the lessor himself cannot come into court to have assets withheld. *King v. Malcott*, 9 Hare 692. The court in the principal case proceeded on the assumption that the lessor was not a creditor. This seems opposed to the analogous cases under the

English Bankruptcy Act, holding that owners of contingent claims may prove the same. *Wolmerhausen v. Gullick*, [1893] 2 Ch. 514. Such claimants seem entitled to protection in probate courts as well as in bankruptcy proceedings; and such was the effect of the earlier English cases. *Cochrane v. Robinson*, 11 Sim. 378. In this country such creditors are generally protected by statutes, although beneficiaries are often allowed to receive their legacies upon giving bonds to secure holders of contingent claims. See *Cobb v. Kempton*, 154 Mass. 266; *Clark v. Holbrook*, 146 Mass. 366.

FIXTURES—EFFECT OF NEW LEASE ON TENANT'S RIGHT OF REMOVAL.—The defendant, a lessee, within his term began to remove trade fixtures which he had put in during a previous lease. His possession had been continuous, but near the end of his first term a new lease renewing and extending the one in force had been executed. The landlord sought to enjoin him from severing the fixtures. *Held*, that the injunction should not be granted. *Rady v. McCurdy*, 58 Atl. Rep. 558 (Pa.).

For a discussion of the principles involved, see 15 HARV. L. REV. 862.

HUSBAND AND WIFE—CONTRACTS BETWEEN HUSBAND AND WIFE—AVOIDANCE OF STATUTE.—A statute declared all contracts between husband and wife involving real estate void. In consideration of his wife's promise to bequeath certain property to designated persons, a man agreed to and did devise his estate to her; but the wife failed to perform her agreement. *Held*, that she takes the property *ex maleficio* in trust for the parties beneficially interested. *Laird v. Vila*, 100 N. W. Rep. 656 (Minn.).

It is well settled that equity will compel the conveyance of an estate, pursuant to an oral agreement, after such part performance by the promisee as would make failure to convey a fraud in law. *Earl of Aylesford's Case*, 2 Stra. 783; *Johnson v. Hubbell*, 10 N. J. Eq. 332. The theory commonly advanced is that the Statute of Frauds cannot be invoked in aid of fraud. See *Montacute v. Maxwell*, 1 P. Wms. 618; *Maddison v. Alderson*, L. R. 8 A. C. 467. It would, however, seem more accurate to say that the fraud upon the promisee who has changed his position in consequence of the promisor's representations raises a constructive trust in favor of the former. Such a trust, not being within the statute, may be enforced in equity without regard to the original agreement. See *Maddison v. Alderson*, *supra*. The situation in the principal case seems analogous. The breach of a promise to hold property for a third person's benefit, given as the inducement for a will in favor of the promisor, is such fraud as will convert the devisee into a constructive trustee. *Thynn v. Thynn*, 1 Vern. 296. Hence though, by statute, the original contract is unenforceable, yet equity should compel the execution of this constructive obligation. *Ahrens v. Jones*, 169 N. Y. 555.

HUSBAND AND WIFE—RIGHTS OF HUSBAND AGAINST WIFE AND IN HER PROPERTY—RIGHT IN SEPARATE ESTATE.—A husband conveyed land to his wife to her separate use. After children were born, the wife died. *Held*, that the husband is not tenant by the curtesy. *Bingham v. Weller*, 81 S. W. Rep. 843 (Tenn.).

It is settled that, unless expressly excluded, a husband is entitled to curtesy in land conveyed by a third person for his wife's separate use, whether the conveyance is directly to her or to a trustee. *Baker v. Heiskell*, 1 Coldw. (Tenn.) 641; *Carter v. Dale, Ross & Co.*, 3 Lea (Tenn.) 710. It is submitted that the same result should be reached where the husband makes the conveyance. He has the same purpose,—to provide for his wife during her life, with power to exclude him forever by transfer,—and this purpose is not defeated by allowing curtesy. The estate and powers given her are the same. The argument that curtesy is presumably excluded because the deed is absolute and to allow curtesy would derogate from the grant is unsound, since the deed does not distinguish the fee simple passed from any other held by the wife, and it is hardly derogation not to pass an interest by way of curtesy which is not possessed at the time. The weight of authority supports this view, whether the husband conveys to a trustee for the wife or directly to her. *Ball v. Ball*, 20 R. I. 520; *contra*, *Sajers v. Wall*, 26 Gratt. (Va.) 354.

INNKEEPERS—DUTY TO GUESTS—TORT OF SERVANT.—The plaintiff, a guest at the defendant's hotel, while seated at the dinner-table, was assaulted and beaten by one of the waiters. The plaintiff brought action to recover damages of the master for the tort of the servant. *Held*, that the defendant is not liable. *Rahmel v. Lehdorff*, 142 Cal. 681.

For a discussion of the principles involved in this case, see 17 HARV. L. REV. 575.

INSURANCE—MUTUAL BENEFIT SOCIETIES—RIGHT OF EXECUTOR TO SUE FOR DEATH BENEFIT FUND.—The by-laws of a mutual benefit association provided for the payment of a death benefit fund to the widow, children, or next of kin of a

deceased member. *Held*, that the executor of a member cannot maintain an action to recover the fund. *Gould v. United, etc., Ass'n*, 58 Atl. Rep. 624 (R. I.).

This decision is supported by the great weight of authority. *Eastman v. Provident, etc., Ass'n*, 62 N. H. 555. In Massachusetts, however, it is only since the passage of comparatively recent statutes that a sole beneficiary on an insurance or mutual benefit contract has been allowed to sue. *Dean v. American Legion of Honor*, 156 Mass. 435. Consequently the personal representative of the deceased has there been allowed to recover as trustee for the beneficiary. *Flynn v. Massachusetts Benefit Ass'n*, 152 Mass. 288. The principal case apparently decides the point for the first time in Rhode Island, in opposition to a *dictum* in an earlier case. See *Munroe v. Providence, etc., Ass'n*, 19 R. I. 363. There seems no reason why the executor, as personal representative of the deceased, should recover more than nominal damages for a breach of contract involving no actual loss to the estate. Where he is expressly named as trustee he may well bring suit as such. *Greenfield v. Massachusetts, etc., Co.*, 47 N. Y. 430. In other instances, as the court argues, it is no part of an executor's duty to act as trustee for the beneficiary, who in most jurisdictions is able to recover in his own right.

MINES AND MINERALS—TRESPASS—RIGHT TO TUNNEL UNDER ANOTHER'S CLAIM.—The plaintiff and the defendant were owners of adjoining mining claims. A statute granted to locators the right to pursue into and through any adjoining claims all veins apexing in their location. The defendant, for the purpose of reaching and working a vein which apexed in his, and extended under, the plaintiff's claim, projected a tunnel through the latter's land. *Held*, that an injunction should be granted restraining the further prosecution of the tunnel. *St. Louis, etc., Co. v. Montana Mining Co.*, 194 U. S. 235.

The decision of this case establishes two propositions: first, that, except as limited by the statute, the land lying vertically beneath a surface location belongs to the owner of that location, and second, that the statute does not grant the right to enter upon or tunnel another's land, except within the bounds of a vein. The first point has been repeatedly affirmed by the state and federal courts. *Cf. Doe v. Mining Co.*, 54 Fed. Rep. 935. Such decisions, together with the statutes under which they were decided, show a long prevalent tendency to increase the property rights of the owner of a mining claim. The movement reaches its culmination in the present case, which establishes what virtually amounts to a common law ownership. In regard to the second point also, the interpretation of the court appears to be in accord with the prevailing opinion. *Cf. Parrot, etc., Co. v. Heinze*, 25 Mont. 139. Since the statute is in plain derogation of the common law principles of the ownership of property, the court seems justified in adhering to a strict interpretation of its terms.

MORTGAGES—FORECLOSURE—EFFECT OF USURY ON RIGHT OF PURCHASER OF EQUITY OF REDEMPTION.—The defendant loaned twelve hundred dollars on the security of a mortgage and a note for sixteen hundred dollars, four hundred of which was exacted as a premium. The mortgagor conveyed the land to the plaintiff subject to a mortgage of twelve hundred dollars. The latter had no knowledge of the premium, so that it was not estimated in fixing the purchase price. The twelve hundred dollars with interest was paid. After foreclosure by the defendant for the remainder, the plaintiff sued to set aside the sale on the ground that the premium exacted was usurious. *Held*, that the amount of the premium is usurious, and, as it was not figured into the purchase price, the sale must be set aside. *Lewis v. Farmers', etc., Ass'n*, 81 S. W. Rep. 887 (Mo., Sup. Ct.).

It is a general rule that the purchaser of an equity of redemption, who buys subject to the mortgage, cannot attack the validity of the mortgage on the ground of usury. *Lee v. Stiger*, 30 N. J. Eq. 610. But where one buys from a mortgagor without any deduction from the purchase price on account of the incumbrance, in most jurisdictions the defense of usury is allowed. *Maher v. Lanfrom*, 86 Ill. 513. It seems to follow logically that where only a part of the incumbrance is figured into the purchase price, a defense as to the rest should be allowed. The only reason for withholding the defense seems to be that the purchaser, by retaining out of the price he agreed to pay sufficient money to pay the mortgage, has placed himself in a position where he cannot plead usury without attempting to defraud both his grantor and the mortgagee. *Trusdell v. Dowden*, 47 N. J. Eq. 396. In the principal case, as the amount of the premium was not considered in determining the price paid, this reason for refusing relief did not exist.

NUISANCE—ACCRUAL OF ACTION—NEGLIGENCE.—One without proprietary interest in his place of residence sought to recover damages for sickness caused by a palpably foul well on the defendant's adjacent land. *Held*, that the plaintiff may recover. *Ft. Worth, etc., Ry. Co. v. Glenn*, 80 S. W. Rep. 992 (Tex., Sup. Ct.).

The court concedes that to recover for a nuisance causing mere personal annoyance in the enjoyment of real property or damage to it, a plaintiff must show legal interest in it to the extent, at least, of possession. *Kavanagh v. Barber*, 131 N. Y. 211. But it distinguishes a second class of nuisances, composed of those which, as in the principal case, cause physical injury to the person and allow recovery without a property basis. This distinction was maintained by the lower court in a New York case which, however, was reversed on other grounds by the higher court. *Hughes v. City of Auburn*, 21 N. Y. App. Div. 311; *contra, Ellis v. Kansas City, etc., R. R. Co.*, 63 Mo. 131. This conflict over the scope of nuisance could be wisely avoided by considering cases of the second class not under that most indefinite head, nuisance, but under the law of negligence. The defendant should use due care to prevent the escape from his premises of unhealthful air liable to cause physical injury to people in the vicinity. This duty he seems to have violated in the principal case and so was properly held liable. See *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 123.

PARTNERSHIP—DISSOLUTION AND WINDING-UP—TERMINATION OF CONTRACT BETWEEN ATTORNEY AND CLIENT.—After the death of one member of a law partnership employed to conduct certain litigation, partly on a contingent basis, the appellees engaged the surviving partner, under a new agreement, in his individual capacity. The litigation having succeeded, the executors of the deceased partner sought to recover his share of the contingent fee under the original contract. *Held*, that the executors may recover. *Clifton v. Clark, Hood & Co.*, 36 So. Rep. 251 (Miss.).

A retainer of a law firm creates a personal contract and may be terminated by a dissolution of the partnership. *McGill v. McGill*, 2 Met. (Ky.) 238. It is sought to take the present case out of this rule because the services of no specific partner were engaged and the litigation was in fact completed by the surviving partner. But in retaining a firm, a client is entitled to the skill and reputation of all, even though he cannot demand the services of any particular member. While the surviving partner must stand ready to complete pending business, the client may exercise a choice. *Little v. Caldwell*, 101 Cal. 553. If he permit the work to be pursued he is bound to his contract. *Page v. Wolcott*, 15 Gray (Mass.) 536. But in terminating the agreement, it ought to make no difference whether he retains an outsider, or the surviving partner in his individual capacity. The deceased partner's estate should recover quasi-contractually for past services which were beneficial in continuing the litigation, even where the fee is contingent upon success, if the contingency has occurred. See *Badger v. Celler*, 41 N. Y. App. Div. 599.

RAILROADS—LIABILITY FOR DAMAGE TO ANIMALS—FENCING STATUTES.—A statute required railroad companies to fence their rights of way, and provided that failure to comply should render them liable in damages to the owners of injured cattle. The plaintiff's colt escaped from its owner, travelled several miles along a highway, broke through a fence into the field of a third party, and thence through the defendant railroad's defective fence to its track, where it was run over by the defendant's engine. *Held*, that the defendant is liable. *Rinehart v. Kansas, etc., Ry. Co.*, 80 S. W. Rep. 910 (Mo., Ct. App.).

In interpreting statutes similar to the Missouri enactment, courts have differed, and even in Missouri the decisions are conflicting. See *Ferris v. St. Louis, etc., Ry. Co.*, 30 Mo. App. 122. Certainly one object of such enactments is the protection of the travelling public. *Dickson v. Omaha, etc., R. R. Co.*, 124 Mo. 140. As to the owners of animals, in England and some eastern states only those whose animals were rightfully upon property adjoining the right of way, and were injured through the railroad's failure to fence, can recover. *Eames v. Salem, etc., R. R. Co.*, 98 Mass. 560. Many western jurisdictions, however, hold with the principal case that the railroad is liable even to owners of trespassing animals. *McCall v. Chamberlain*, 13 Wis. 637. In the former jurisdictions the common law rule generally prevails, requiring the owner of animals to keep them in at his peril. In some western states this rule is not in force, stock being allowed to graze at large. *Wagner v. Bissell*, 3 Ia. 396. This in part accounts for the conflict in interpretation, and makes it possible to support both lines of authority without violating the principle that to recover under a statute, the plaintiff must show that he is one of the class which the legislature intended to protect.

RES JUDICATA—WHAT JUDGMENTS ARE CONCLUSIVE—DISMISSAL BY CONSENT. *Semble*, that a dismissal of a suit by agreement of the parties will not bar a later action upon the same subject-matter between the same parties. *Lindsay v. Allen*, 82 S. W. Rep. 171 (Tenn.). See NOTES, p. 60.

TENANTS IN COMMON — LEASES — HOLDING OVER. — A and B leased a building of which they were cotenants, to a firm composed of B and C. Upon the expiration of the lease, B, against the will of A, gave the firm written permission to occupy the premises temporarily, pending removal. The lessees accordingly held over, whereupon A sued for his fraction of rent for the new year. *Held*, that the defendants are to be regarded as occupying the premises after the expiration of the lease as cotenants of the plaintiff, and are liable, at most, only for occupation rent. *Valentine v. Healy*, 178 N. Y. 391.

The tendency of the more recent decisions, as well as the English practice, is opposed to the New York rule that a tenant in common who has taken a lease of the moiety of his cotenant, is not liable as under a new lease for holding over. See *O'Connor v. Delaney*, 53 Minn. 247; *Leigh v. Dickeson*, L. R. 15 Q. B. D. 60. The New York court has, however, extended the principle by including within it the case stated. It is clear that the firm of B and C occupied the premises purely by virtue of the relationship of landlord and tenant which the lease established between it on the one side and A and B on the other; and it is difficult to see how it can be held to shift to the position of cotenant, especially since one of its members had no interest in the property. If a partnership may properly be considered a distinct legal entity, the view advanced becomes more difficult to support. See *Henry v. Anderson*, 77 Ind. 361; *Valentine v. Healy*, 86 Hun (N. Y.) 259. Furthermore, to attain the result reached here one must do violence to the rule that one tenant in common cannot bind his cotenant without the latter's consent. *Mussey v. Holt*, 24 N. H. 248.

TRUSTS — CREATION AND VALIDITY — REVOCATION. — The defendant's intestate made a deposit of her own money in a savings bank "as trustee for" the plaintiff. Later the account was transferred to her own name, and finally withdrawn; one-half of it was then redeposited in trust for the plaintiff, and remaining intact at the depositor's death was turned over to the former, who made claim for the balance. The plaintiff knew of neither deposit until a year after the depositor's death. *Held*, that the original trust is merely tentative, revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration. *Totten v. Lattan*, 31 N. Y. L. J. 1717 (N. Y., Ct. of App., Aug. 5, 1904).

The New York court formerly held that a deposit by one person in trust for another raises the presumption that a trust was intended; and where no evidence of a contrary nature appeared, the beneficiary was allowed to recover. *Martin v. Funk*, 75 N. Y. 134; *contra*, *Clark v. Clark*, 108 Mass. 522. Where the depositor's real intent was to evade a rule of the bank, or to avoid taxation, this presumption is rebutted and no trust is created. *Brabrook v. Boston, etc., Bank*, 104 Mass. 228. The principal case expressly establishes a new doctrine in New York, and seems to lay down different rules according as the question arises before or after the donor's death, allowing revocation before death of what after death would be presumed an absolute trust. This would seem an unfortunate distinction, as it tends to obscure the vital question as to the intent of the donor at the time of making the deposit. If he then intended to create a trust, it should be irrevocable, unless the power of revocation was expressly reserved at that time. *Mabie v. Bailey*, 95 N. Y. 206.

TRUSTS — FOLLOWING TRUST PROPERTY — CONVEYANCE TO A VOLUNTEER. — A trustee at the request of the *cestui* conveyed the trust estate to a volunteer with notice. It was the intention of all the parties that the volunteer should hold free from the trust. *Semble*, first, that the volunteer took free from the trust; second, that this was not an assignment of an interest in land within Mass. Rev. Laws c. 127, § 3. *Matthews v. Thompson*, 71 N. E. Rep. 93 (Mass.). See NOTES, p. 53.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — LIABILITY FOR INTEREST. — The defendant's intestate retained certain extra commissions allowed him as trustee by a decree of the court. On an appeal taken from this decree, the decision was reversed and the plaintiff adjudged entitled to the sum thus retained. The plaintiff then sought to charge the defendant with interest. *Held*, that the plaintiff is not entitled to interest. *Southern Ry. Co. v. Glenn's Adm'r*, 46 S. E. Rep. 776 (Va.).

As the defendant kept his commissions in good faith and under judicial sanction, the court refused to charge him with interest. This result seems opposed to the general rule, which is well settled that a trustee is liable for interest on trust funds which he deals with in violation of the trust. *McComb v. Frink*, 149 U. S. 629. This rule is also followed where the trustee acts wrongfully but in good faith. *McCausland's Appeal*, 38 Pa. St. 466; see *Powell v. Fulkers*, 33 Ch. D. 552. There is, however, some authority for the view that where a fiduciary acts innocently, he will not be held liable for interest. *Pulliam v. Pulliam*, 10 Fed. Rep. 53. It is submitted that the

former rule is not only supported by the weight of authority, but is correct on principle. As the trustee has had the use of the money and has deprived the *cestui* of the benefit of it, it seems only fair to the latter to charge the trustee with interest. His good faith should make no difference in the result.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES — RIPARIAN RIGHTS OF RAILWAY COMPANY TO ABSTRACT WATER FOR SUPPLYING LOCOMOTIVES. — A railway company, owning a narrow strip of land along a stream, laid a pipe between the stream and a tank from which they proposed to supply their locomotives with water. The defendant, who owned a mill situated lower down the stream, took up the pipe; whereupon the railway company sought an injunction against further interference by him. *Held*, that the injunction be refused, since the proposed user is unlawful, even though no material damage be caused thereby. *McCartney v. Londonderry, etc., Ry. Co.*, [1904] A. C. 301.

This is the third time that the question of a railway's right to take water from a stream for the use of its locomotives has been passed upon by an English court. In the first case, the use was forbidden because it impeded navigation. *Attorney-General v. Great Eastern Ry. Co.*, L. R. 6 Ch. App. 572. The second case, between a lower mill-owner and the railroad, was decided in favor of the latter. *Earl of Sandwich v. Great Northern Ry. Co.*, L. R. 10 Ch. D. 707. The present decision in the House of Lords overrules the last case, and definitely settles the point in England. The court proceeds upon the ground that as the water was to be used chiefly off the land its taking was unlawful. *Cf. Swindon Waterworks Co. v. Wilts, etc., Navigation Co.*, L. R. 7 H. L. 697. Furthermore it is argued that while the mill-owner might suffer no material damage, nevertheless a right of his was being infringed which would in time give the railway company a right by prescription. Such infringement of a right is generally held actionable. *Blodgett v. Stone*, 60 N. H. 167. The decision seems clearly sound and is in accord with the authorities in this country. *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438.

WATERS AND WATERCOURSES — SUBTERRANEAN AND PERCOLATING WATERS — RIGHT TO APPROPRIATE PERCOLATING WATERS. — *Held*, that a property owner may collect percolating waters for use off the land although he thereby drains a well on neighboring premises, the waters from which had been used only for domestic purposes. *Houston, etc., R. R. Co. v. East*, 81 S. W. Rep. 279 (Tex., Sup. Ct.).

This decision is in accord with the English rule. See 16 HARV. L. REV. 295; 17 *ibid.* 426.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

EXTRINSIC EVIDENCE IN AID OF INTERPRETATION. — This important and difficult subject is examined by Sidney L. Phipson in a recent article, *Extrinsic Evidence in Aid of Interpretation*, 20 L. Quar. Rev. 245 (July, 1904). The article is a clear discussion of Wigram's classic work and the many criticisms thereon, and offers independent ideas of value as well. Mr. Phipson stands by Wigram's treatment of interpretation as a question of evidence, thus taking issue with Professors Thayer and Wigmore. As to the object of interpretation — whether, as Wigram maintains, it is to ascertain the meaning of the words, or, as Hawkins and Thayer hold, to learn the intention of the writer — Mr. Phipson concludes that Hawkins's hypothesis is preferable. He finds the rejection of declarations of intention, when strictly considered, not really in conflict with Hawkins's contention. He thinks it not necessary, however, to adopt either theory in its more rigid form and approves Professor Graves's standpoint "that the object is to discover the meaning of the words as intended by the testator." Coming to the two opposing classifications and general rules as to the evidence receivable, Mr. Phipson again prefers Hawkins to Wigram. After elaborate

examination he says that "Wigram's distinction between 'explanatory evidence' and 'evidence of intention' cannot be supported, and that Mr. Hawkins and others are more correct in considering all extrinsic facts tendered in aid of interpretation to be, in effect, evidence of intention, circumstantial or direct. With regard, however, to the general rule of each writer, it is clear that since the admission of extrinsic evidence is determined by a variety of principles . . . it would be well-nigh impossible to devise any simple general rule . . . which could be made to do the work of all possible special ones." The author then points out that Wigram's explanatory evidence is not "always admissible," nor his evidence of intention "always inadmissible," and that Hawkins's view that circumstantial evidence of intention is invariably admissible cannot be sustained.

Mr. Phipson declares that in reducing the various rules and principles to seven working propositions, Wigram seems to have done all that is possible to secure condensation without sacrificing adequacy or exactness. Examining these propositions in detail, Mr. Phipson upholds the second, that primary meanings must if sensible inflexibly prevail, against Professor Thayer's doctrine that if relevant facts favor a secondary meaning that may be adopted. Proposition III is declared correct if properly read with the others, provided it means "the clear modern rule that after proof of an object or objects substantially though incorrectly answering the description, further evidence, *e. g.*, of treatment, dealing, and habits of speech, although not of course of direct declarations, is admissible to show that the testator in fact intended to refer to the object alleged." Except for the "now untenable proposition that 'no fact can be material which is not coincident in point of time with the making of the will,'" Proposition V is sustained. Though Proposition VII, as to equivocation, is not criticised, Hawkins's objection to Wigram's reasons for the admission of declarations of intention is considered strong, when he says that thus defining what is indefinite is making "a material addition to the will," and that it is only an historical anomaly that such evidence is not admissible generally. Mr. Justice Holmes's rejoinder in the *HARVARD LAW REVIEW*, Vol. XII. pp. 418, 419, is held not to meet these strictures satisfactorily. Subject to these modifications, Mr. Phipson finds in the Propositions the true value of Wigram's work, and declares they appear still to embody the most accurate and exhaustive statement of the law on the present topic.

A BRIEF HISTORY OF THE PAROL EVIDENCE RULE. — The interesting and valuable results of an original investigation into the sources and development of the rule by which the written memorandum of a transaction is declared to be conclusive as to its terms, is contained in a recent article by Professor Wigmore of the Northwestern University Law School. *A Brief History of the Parol Evidence Rule*, 4 *Columbia L. Rev.* 338 (May, 1904). The doctrine was unknown to the Germanic invaders of Rome and Western Europe. A general ignorance of letters and the existence of a "legal system of formal oral transactions" combined to strip the *carta*, or document of that period, of further value than as a means of effecting a formal symbolic delivery of land, and of preserving the names of witnesses upon whom alone reliance was placed for proof of the terms of the transaction. A notable advance in the status of written documents appeared with the rise of the seal. The principle that the king's word is indisputable gained for a document bearing his seal incontestability. As the use of the seal came to be extended to all persons, it carried with it the same attributes until, by the thirteenth century, the incontestability of sealed instruments was complete. Consequently the office of witnesses as vouchers for the terms of the original transaction receded into unimportance. But ignorance, coupled with the fact that all transactions affecting land were still practised with oral forms, prevented writings from becoming more than an alternative kind of proof. However, mercantile custom had already led the advance, and a tendency to become lettered had brought with

it an appreciation of the trustworthiness of writing as against the "shiftiness of mere testimonial recollection." So a growing unwillingness of the judges to admit to the jury oral transactions calculated to overturn the words of the writing made for the new principle. Meanwhile the theory of the rule was undergoing a transition. At first the idea prevailed that he who has sealed a document is estopped from proving the terms of the transaction by witnesses. But more important was the theory of the inferiority of certain writings to others, which involved the notion that the sealed instrument discharged or replaced all others. Mr. Wigmore then explains how, with this preparation, the beginning of the final advance to the modern idea was marked by the Statute of Frauds and Perjuries. This legislation, by abolishing the practice of creating freehold estates by oral livery of seisin only, and the necessity of the seal in the case of leases, emphasized the constitutive nature of the document and extended the conception to all writings. This idea was followed in other transactions not affected by the statute, and the modern view came into complete existence. In conclusion Mr. Wigmore points out that the principle of the indisputability of the king's word as embodied in his sealed document led to the conception that the written records of his court were incontestable as well; so that the "notion of a constitutive writing is now extended to include the record of a judicial proceeding."

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- ACTIONS FOR MALICIOUS PROSECUTION. *Silas Alward*. Considering chiefly the question how far defendant's obtaining opinion of counsel is to be considered probable cause. 40 *Can. L. J.* 296.
- ACTS IN EMERGENCIES AS CONSTITUTING CONTRIBUTORY NEGLIGENCE. *Glenda Burke Slaymaker*. 58 *Cent. L. J.* 463.
- AMERICA'S CONTRIBUTION TO THE LITERATURE OF INTERNATIONAL LAW AND DIPLOMACY. *John W. Foster*. 13 *Yale L. J.* 409.
- ASPECTS OF THE MEANING OF THE WORD "CONCURRENT" IN USE WITH FIRE INSURANCE POLICIES, SOME. *M. C. Phillips*. Brief examination of the few cases in point. 59 *Cent. L. J.* 62.
- BABYLONIAN LAW. *Ross G. Murison*. A brief outline of the Code of Hammurabi. 3 *Can. L. Rev.* 439.
- BRISES TO AGENTS. *Anon.* Commenting adversely on a recent Ontario case. 40 *Can. L. J.* 489.
- BRIEF HISTORY OF THE PAROL EVIDENCE RULE, A. *John H. Wigmore*. 4 *Columbia L. Rev.* 338. See *supra*.
- CANCELLATION OF A FIRE INSURANCE POLICY, THE. *M. C. Phillips*. 59 *Cent. L. J.* 123.
- CASE OF PENTAL ISLAND, THE. *W. Harrison Moore*. Discussing the boundary dispute between Victoria and New South Wales. 20 *L. Quar. Rev.* 236.
- CHRISTIAN SCIENCE AND THE LAW. *Irving E. Campbell*. 10 *Va. L. Reg.* 285.
- CIVIL CODE OF LOUISIANA AS A DEMOCRATIC INSTITUTION, THE. *Charles E. Fenner*. Comparing the Louisiana code with uncodified common law and arguing for the superiority of the former. 12 *Am. Law.* 331.
- CONFLICTING OPINIONS IN THE MERGER CASE, THE. *Bruce Wyman*. 16 *Green Bag* 298.
- CONSOLIDATIONS OR TRUSTS. *Theodore D. Gottlieb*. An outline summary of the origin, growth, and development of corporations, with a review of the first attempts towards trust consolidation. 27 *N. J. L. J.* 165.
- CONSTITUTIONAL LAW OF THE UNITED STATES AS MOULDED BY DANIEL WEBSTER. *Everett P. Wheeler*. 13 *Yale L. J.* 366.
- CORPORATIONS OF TWO STATES. *Joseph Henry Beale, Jr.* 4 *Columbia L. Rev.* 392.
- CRITICAL ANALYSIS OF THE LAW AS TO MISTAKE IN ITS EFFECT UPON CONTRACTS. *Truman Post Young*. 38 *Am. L. Rev.* 334.
- CROWN AS REPRESENTING THE STATE, THE. *P. Cobbett*. Pointing out difficulties in Australian law arising from failure to recognise the State as a legal person and from the attempt to make the King serve that purpose. 1 *Commonwealth L. Rev.* 145.
- DELIVERY OF POLICY AS CONDITION PRECEDENT TO COMPLETE CONTRACT OF INSURANCE. *Gulford A. Deitch*. Consisting principally of quotations from decisions. 59 *Cent. L. J.* 28.

- DEPOSIT OR BAILMENT IN A CLOTHING ESTABLISHMENT. *Nathan Newmark*. 58 Cent. L. J. 405.
- DIFFERENCES BETWEEN ENGLISH AND COLONIAL LAW, SOME. *Everard Digby*. Contrasting law of England with that of New South Wales. 29 L. Mag. & Rev. 294.
- DOMESTIC SERVANTS. *Geo. S. Holmsted*. Discussing how far English law that a general hiring is for a year terminable at a month's notice is applicable in Canada. 24 Can. L. T. 125.
- ENFORCEMENT ABROAD OF STOCKHOLDERS' OR DIRECTORS' LIABILITY, THE. *Joseph Henry Beale, Jr.* 16 Green Bag 387.
- ENGLISH HISTORY AND THE STUDY OF ENGLISH LAW. *Arthur Lyon Cross*. Indicating the importance of the study of English History to a scholarly knowledge of the common law. 2 Mich. L. Rev. 649.
- EQUITABLE DOCTRINE OF MARSHALLING ASSETS OF DECEDENT'S ESTATE FOR PAYMENT OF DEBTS. *C. B. Garnett*. 10 Va. L. Reg. 175.
- EQUITABLE MORTGAGES. *A. H. Marsh*. 24 Can. L. T. 134.
- EVOLUTION OF THE "PUB"—A SKETCH OF THE EARLIER HISTORY OF THE LICENSING LAWS. *H. J. Randall*. 20 L. Quar. Rev. 316.
- EXTRINSIC EVIDENCE IN AID OF INTERPRETATION. *Sidney L. Phipson*. 20 L. Quar. Rev. 245. See *supra*.
- FISHERMEN AND THE LAW. *John J. O'Connor*. Pointing out differences between the law as applied to fishermen and as applied to other seamen. 16 Green Bag 582.
- FORMER JEOPARDY. *O. B. Harvey*. Distinguishing the plea of former jeopardy, using the word in its strict sense, from that of former acquittal or conviction. 10 Va. L. Reg. 410.
- FRAUDULENT PREFERENCES. *A. Rives Hall*. An exposition of Quebec law on the subject. 3 Can. L. Rev. 290.
- FREE SPEECH AND FREE PRESS IN RELATION TO THE POLICE POWER OF THE STATE. *P. L. Edwards*. Arguing that statutes prohibiting publication of criminal news are constitutional. 58 Cent. L. J. 383.
- FUTURE INTERESTS IN LAND. *Edward Jenks*. An attempt "to restate, in short and simple form, the doctrine of future interests in land, as it results from modern English law." 20 L. Quar. Rev. 280.
- FUTURE OF INTERNATIONAL LAW, THE. *Allen E. Rogers*. 16 Green Bag 322.
- HOW JUDGMENTS ARE AFFECTED BY THE "FULL FAITH AND CREDIT" SECTION OF THE UNITED STATES CONSTITUTION AND THE ACTS OF CONGRESS OF MAY 26, 1790, AND MARCH 27, 1804. *Geo. P. Costigan, Jr.* Pointing out likenesses and differences between strictly foreign judgments and judgments of sister States. 38 Am. L. Rev. 350.
- ILLOGICAL TREND IN RES ADJUDICATA, AN. *Sam'l C. Williams*. A protest against the English view that two separate actions may be maintained for injury to person and to property from the same wrongful act. 59 Cent. L. J. 244.
- IMPEACHMENT OF WITNESSES. *Wm. Trickett*. Discussing Pennsylvania law. 8 Forum (Dickinson) 245.
- IMPEACHMENT OF WITNESSES BY PROOF OF SPECIFIC WRONGFUL ACTS. *James A. Yantis*. An elaborate article with full citation of authority. 59 Cent. L. J. 143, 164, 184.
- IMPRACTICABLE COMPANIES ACT, 1900, THE. *Anthony Pulbrook*. 29 L. Mag. & Rev. 302.
- INAPPLICABILITY OF DECISIONS UNDER THE BRITISH NORTH AMERICA ACT TO CASES ARISING UNDER THE CONSTITUTION OF THE COMMONWEALTH, THE. *A. Inglis Clark*. 1 Commonwealth L. Rev. 193.
- INTERNATIONAL LAW IN LEGAL EDUCATION. *James B. Scott*. 4 Columbia L. Rev. 409.
- INTER-STATE SERVICE OF PROCESS. *Paris Nesbit*. Discussing provisions of the federal constitution of Australia. 1 Commonwealth L. Rev. 203.
- IRREGULAR ASSOCIATIONS. *George Wharton Pepper*. A preliminary study for a chapter on the Law of Association which the writer has in course of preparation. 52 Am. L. Reg. 409, 504, 576.
- IS THE JUDGMENT OF THE DIRECTORS OF BUSINESS CORPORATIONS CONCLUSIVE IN DETERMINING THE VALUE OF PROPERTY TAKEN IN PAYMENT OF ITS STOCK? *Henry P. Molloy*. 66 Albany L. J. 207.
- IS THIS RIGHT? *Donald McMaster*. A plea for reform in practice in bringing appeals to the Privy Council. 3 Can. L. Rev. 355.
- JUDICIAL CONSTITUTIONAL AMENDMENT AS ILLUSTRATED BY THE DEVOLUTION OF THE INSTITUTION OF THE JURY FROM A FUNDAMENTAL RIGHT TO A MERE METHOD OF PROCEDURE. *Frederic R. Coudert*. 13 Yale L. J. 331.

- JUDICIAL HISTORY OF INDIVIDUAL LIBERTY, THE. V.-IX. *Van Vechten Veeder*. 16 Green Bag 317, 395, 471, 529, 591.
- JUDICIAL POWER OF THE COMMONWEALTH, THE. *T. R. Barin*. Discussing provisions of the Constitution of Australia. 1 Commonwealth L. Rev. 97.
- LABOR STRIKES AND INJUNCTIONS. *P. L. Edwards*. 59 Cent. L. J. 23.
- "LAST CLEAR CHANCE." *Thomas W. Shelton*. 10 Va. L. Reg. 301.
- LAW APPLICABLE TO THE USE OF ELECTRICITY IN MODERN INDUSTRIAL LIFE. *Helm Bruce*. 12 Am. Law. 290, 337.
- LAW OF DAMDUPAT, THE. *J. R. Gharpure*. Discussing the rule of Hindu Law that "interest exceeding the principal sum lent can never be recovered at any one time." 6 Bombay L. Rep 129.
- LAW RELATING TO DEPOSITS RECEIVED BY INSOLVENT BANKS, THE. *Albert S. Bolles*. 52 Am. L. Reg. 438.
- LEGAL ASPECTS OF THE PANAMA QUESTION. *Roland Crangle*. 12 Am. Law. 214, 251.
- LEGAL FRAUD. *Silas Alward*. Discussing the origin and meaning of the term in the light of judicial decisions. 24 Can. L. T. 225.
- LEGAL MONOPOLY. *Alton D. Adams*. Discussing the "trust" problem from the contract side. 19 Pol. Sci. Quar. 173.
- LEGISLATION OF THE SESSION, THE. *Anon.* A summary of the work of Parliament during the last session. 117 L. T. 451.
- LIABILITY OF A MANUFACTURER OR A VENDOR TO PERSONS WITH WHOM HE HAS NO CONTRACTUAL RELATIONS FOR NEGLIGENCE IN THE CONSTRUCTION OR SALE OF CHATTELS. *Charles Loring*. 58 Cent. L. J. 365.
- LIABILITY OF AN EMPLOYER FOR THE TORTS OF AN INDEPENDENT CONTRACTOR. PART I. *C. B. Labatt*. A monograph covering one hundred and forty pages treating cases in which liability is not imputed to the employer. 40 Can. L. J. 529.
- LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENCE IN THE TRANSMISSION AND DELIVERY OF MESSAGES. *Graham B. Smedley*. 10 Va. L. Reg. 392.
- MARRIED WOMEN BEFORE THE LAW IN NORTH CAROLINA. *Thomas Ruffin*. 1 North Carolina J. of L. 230.
- MERGER DECISION, THE. *John S. Wise*. Supporting the decision. 8 L. Notes (N. Y.) 325.
- MODIFICATIONS OF THE JURY SYSTEM. *John Burton Phillips*. Advocating abolition of unit rule in civil cases. 16 Green Bag 514.
- MURRAY RIVER BOUNDARY, THE. *W. H. Moore*. 1 Commonwealth L. Rev. 157.
- NATIONAL CONTROL OF THE POLLUTION OF PUBLIC WATERWAYS. *Charles Cluffin Allen*. Arguing in support of the decision of the U. S. Supreme Court in the recent case of Missouri v. Illinois. 38 Am. L. Rev. 321.
- NATURE AND INTERRELATION OF SOVEREIGN STATES. *Eugene Stevenson*. 38 Am. L. Rev. 551.
- NEGRO BEFORE THE SUPREME COURT, THE. *B. Frank Dake*. An examination of all the cases before the Supreme Court in which the political or civil status of the negro has been involved. 66 Albany L. J. 238.
- NEURASTHENIA, THE RESULT OF NERVOUS SHOCK, AS A GROUND FOR DAMAGES. *Flora V. Woodward Tibbits*. A medico-legal treatment of the subject, favoring recovery. 59 Cent. L. J. 83.
- NEW YORK CODE OF EVIDENCE, A. III. *David Dudley Field and William Rumsey*. 5 Brief 119.
- NONSUIT. *Walter H. Trueman*. Discussing the general law and practice on the subject. 24 Can. L. T. 165.
- NORTHERN SECURITIES DECISION, THE. *George F. Canfield*. An elaborate adverse comment. 4 Columbia L. Rev. 315.
- NORTHERN SECURITIES DECISION, THE. A REVIEW. *Henry Wolf Bihl*. 52 Am. L. Reg. 358.
- NOTE ON REX v. BAMFORD. *Everard Digby*. Discussing law in force in land ceded to the Commonwealth of Australia by New South Wales before laws were passed by Commonwealth. 1 Commonwealth L. Rev. 106.
- NOTEWORTHY DECISIONS OF THE JUDICIAL YEAR. *Anon.* A résumé of English decisions. 117 L. T. 379, 405, 427.
- ONE PHASE OF FEDERAL POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION. *John C. Donnelly*. Discussing *Scranton v. Wheeler*, 179 U. S. 141, as to the rights of riparian owners on navigable rivers as affected by the Commerce Clause. 2 Mich. L. Rev. 670.
- PANAMA SITUATION IN THE LIGHT OF INTERNATIONAL LAW, THE. *William Cullen Dennis*. 52 Am. L. Reg. 265.
- PARRICIDE AND JUSTICE, THE. AN HISTORICAL SKETCH. *Charles Green Cumston*. 16 Green Bag 578.

- PENAL CONSEQUENCES OF BANKRUPTCY UNDER THE BANKRUPTCY LAWS OF ENGLAND AND THE UNITED STATES. *E. W. Hansell*. 12 Jour. Soc. Comp. Leg. 271.
- PHYSICIAN AS AN EXPERT, THE. II. *H. B. Hutchins*. 2 Mich. L. Rev. 687.
- POWER OF THE LEGISLATURE TO ABOLISH A RULE OF EQUITABLE PROCEDURE BY ENACTING A REMEDY AT LAW, WHERE NO PROHIBITORY WORDS ARE USED IN SUCH ENACTMENT. *T. A. Sherwood*. Discussing a Missouri statute and decisions thereunder. 59 Cent. L. J. 44.
- PRESENT COMPLEXITY OF LAND LAW AND ITS REMEDY, THE. *J. E. Hogg*. 20 L. Quar. Rev. 292.
- PROFESSIONAL RELATIONS OF THE LAWYER TO THE CLIENT, TO THE COURT AND TO THE COMMUNITY, THE. I. *Henry Wynans Jessup*. Discussing the subject in the light of New York statutes. 5 Brief 145.
- PROPOSED AMENDMENTS TO THE SUPREME COURT ACT. *E. R. Cameron*. 3 Can. L. Rev. 377, 403.
- PROPRIETY OF DIRECT EVIDENCE OF INTENTION. *Colin P. Campbell*. 58 Cent. L. J. 445.
- PROVABILITY OF TORT-CLAIMS IN BANKRUPTCY. *Stanley Folz*. 52 Am. L. Reg. 473.
- QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR. I-V. *Años S. Hershey*. 16 Green Bag 306, 375, 452, 538, 595.
- RECENT CASE OF TREASURE TROVE, THE. *Robert Munro*. Commenting upon Attorney-General v. Trustees of British Museum, 19 Times L. Rep. 555. 59 Cent. L. J. 65.
- RECENT DECISIONS UPON THE MONEY-LENDER'S ACT. *Hugh H. L. Bellot*. Maintaining they have made the act nugatory. 29 L. Mag. & Rev. 315.
- REFORM IN CRIMINAL PROCEDURE. *Everett P. Wheeler*. 4 Columbia L. Rev. 356.
- RESPONSIBILITY OF A CHILD FOR ITS TORTS OR WRONGS, THE. *Theodore Sutro*. 38 Am. L. Rev. 371.
- RIGHT OF THE SUBJECT TO PERSONAL LIBERTY IN ENGLISH LAW, THE. *S. P. J. Merlin*. Tracing the growth of the right. 29 L. Mag. & Rev. 266.
- RIGHT TO LIGHT, THE. *Charles Thwaites*. 26 L. Stud. J. 127.
- RIGHTS AND LIABILITIES OF INFANTS, THE. *Hugh Pettitt*. 26 L. Stud. J. 143.
- RULE FORBIDDING SUITS AGAINST RECEIVERS WITHOUT LEAVE, AS APPLIED TO RECEIVERS MANAGING RAILROAD AND LIKE CORPORATIONS, THE. *W. A. Coutts*. A protest against the injustice worked by the rule and its tendency to despotism. 38 Am. L. Rev. 516.
- SHOULD THERE BE FREEDOM OF CONTRACT? *Clarence D. Ashley*. Arguing that the courts rightly restrict freedom of contract in certain cases. 4 Columbia L. Rev. 423.
- STATUTES OF ONTARIO, THE. 1904. *N. W. Hoyles*. 24 Can. L. T. 251.
- SUICIDAL DECLARATIONS IN HOMICIDE CASES. *G. M. Dahl*. 59 Cent. L. J. 103.
- SWEDISH LAW REFORM. *Seymour D. Thompson*. A review of a recent work by a Swedish author. 38 Am. L. Rev. 388.
- TEST BY WHICH TO DETERMINE WHETHER THE CASE IS FOR THE JURY, THE. *Colin P. Campbell*. 59 Cent. L. J. 224.
- "THIEVES" IN RELATION TO A POLICY OF MARINE INSURANCE. *H. Birch Sharpe*. 20 L. Quar. Rev. 300.
- TRIAL BY JURY AND "DOUBLE JEOPARDY" IN THE PHILIPPINES. *Libbens R. Wilfley*. A paper called forth by three recent cases before the Supreme Court. 13 Yale L. J. 421.
- VALIDITY OF LEGISLATION LIMITING HOURS OF LABOR. *Anon.* Attacking the constitutionality of "eight hour" laws. 58 Cent. L. J. 361.
- VIRGINIA STATE CORPORATION COMMISSION, THE. *A. Caperton Braxton*. Showing the need for such an institution having judicial and executive as well as legislative functions. 38 Am. L. Rev. 481; 10 Va. L. Reg. 1.
- WAGERING CONTRACTS. *Krishnalal Mohautal Jhaveri*. Discussing the Indian law on the subject. 6 Bombay L. Rep. 153.
- WHEN AND IN WHAT CASES MAY THE OWNER OF ANIMALS WHICH ARE NATURALLY TAME BE LIABLE FOR THEIR MISCHIEVOUS OR WRONGFUL ACTS? *Walter J. Lots*. 59 Cent. L. J. 204.
- WHEN AND IN WHAT CASES WILL A REPRESENTATION AS TO THE VALUE OF REAL OR PERSONAL PROPERTY BE SUFFICIENT TO PREDICATE AN ACTION FOR FRAUD? *Walter J. Lots*. 58 Cent. L. J. 484.

II. BOOK REVIEWS.

THE LAW OF WATERS AND WATER RIGHTS, International, National, State, Municipal, and Individual, including Irrigation, Drainage, and Municipal Water Supply. By Henry Philip Farnham. In three volumes. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1904. pp. clxxx, 1-896; xvi, 897-1893; xiv, 1894-2956. 8vo.

When one stops and thinks of the innumerable ways in which water enters into our lives and dealings, one recognizes at once the immense task of the author who attempts to collect into one systematic legal treatise "every case that is wet." Such, however, in his own language, has been the undertaking of Mr. Farnham, the results of which the publishers have now laid before the public. The labor of the author has covered a period of twelve years. The author tells us that he has during this time examined all American reports, page by page, and that all English cases which have been referred to by digests, text-writers, or judges, as involving the question of water rights, have been read. Mr. Farnham's experience and position as associate editor of the *Lawyers' Reports Annotated* have made it possible for him to accomplish this work within what would otherwise have been prohibitive time and expense. The result has been a collection of seventeen thousand cases.

The three volumes cover about three thousand pages. The general plan of Mr. Farnham's work is unique and commendable. The rights and duties with respect to waters depend primarily on the relations which the opposing parties bear toward each other. The rights and duties of governments and nations in their relations to each other are different from those which exist in their relations to their own subjects, and the rights and duties between sovereign and subject are, again, different from those existing solely between subjects. Therefore it would seem that the author has properly divided the general subject of waters so as to show the rights depending on these different relations, and not, as is the usual method of division, on the mere characteristics of the body of water on or about which a particular right arises. Accordingly there are three main divisions of the work: I. Rights of States and Nations; II. Rights between Public and Individual; III. Rights between Individuals.

The principal subdivisions of the first part are "Coast waters," "Laws in force on the high seas," "Boundary rivers," and "Relation between the United States and State governments." The treatment of the last subdivision is the least satisfactory portion of Mr. Farnham's book. The subject is worth another entire volume, and the forty pages given it are woefully insufficient.

The second portion of the work, covering fourteen hundred pages, relates to rights between the public and individuals. First in importance in this division are the titles of "Municipal water supply" and "Drainage." In the discussion of the former, Mr. Farnham has been carried by the character of his undertaking into all the intricacies involved in the controversy over the extent of the power of a municipality to own and control public utilities and to borrow money. This portion of the book is particularly praiseworthy. Other important subdivisions of this part are "Title to bed and shores of water ways," "Rights of riparian owners," and "Bridges, fords, levees, and other public improvements."

Just one-half of the work is given up to the third part, "Rights between Individuals." The first two hundred pages are taken up by a discussion of the rights of riparian owners in watercourses. A comparison of these pages with those occupied by the treatment of these same questions when they arise between the public and individuals will completely justify the author's plan, and explain many of the apparent inconsistencies in the decisions and in the statements of text-writers. The next one hundred and fifty pages are consumed by a discussion of the right to dam back the waters of a stream. It would

have been better if the "Mill Acts" had been discussed in connection with this last heading instead of being given a separate and independent treatment after the discussion of "Irrigation" and "Appropriation." The two hundred and fifty pages given to these last-named subjects will form the most interesting and important portion of the work for the legal profession in the arid and semi-arid states of the West. It is important as being the latest thorough treatment of these growing and difficult problems of our law. The most important of the remaining topics concern the form and construction of grants and contracts, licenses, easements, surface water and drainage, subterranean waters, and rights between landlord and tenant.

In enumerating these different subdivisions, it has not been attempted to give them all. Those have been chosen which have appeared particularly complete or for other reasons exceptionally worthy of notice. Nor has it been possible to go into detail with regard to the author's legal views as to particular principles or cases. So far, however, as it has been possible to form an opinion, they seem, in general, accurate. Slight inaccuracies have been noticed, but these were only such as are inevitable in a work of this character. If a general criticism be allowed, it is this, that the text at places takes too much the form of a digest.

There is one feature of the work that is sufficient alone to win for the work a place in every legal library. Nothing is so discouraging to a lawyer as to run across the statement of a general principle for which are cited in a note a long line of cases merely by their reports and pages, compelling the lawyer to search through them all, only to find, perhaps, that few, if any, are similar enough in their facts to be of service. In the notes to the present work, enough facts of a case are generally stated to avoid this difficulty.

As a general rule it is believed the production of legal works of large scope should be discouraged. With the exception of a few notable treatises the legal works covering broad subjects are now of little use to the practising lawyer. His needs are best met by the book which embraces a small field and in that field gives to the cases and principles a profound and careful examination and discussion. Mr. Farnham's comprehensive treatise must be regarded as a clear exception to the general rule. While the statement of a recent writer that this work "is destined to become one of the greatest law books of the age" is perhaps extravagant, it may fairly be said that, considering its scope, Mr. Farnham's work is surprisingly accurate, thorough, and complete. J. M. B. JR.

A TREATISE ON STREET RAILWAY ACCIDENT LAW. By Ellery H. Clark. Second Edition. St. Paul, Minn: Keefe-Davidson Company. 1904. pp. xv, 607. 8vo.

STREET RAILROAD ACCIDENT LAW. A complete treatise on the principles and rules of law applied by the courts of the states and territories of the United States and Canada in determining the liability of street railroads, for injuries to the person and property by accidents to passengers, employees, and travellers on the public streets and highways, and on pleading and practice in the various jurisdictions in street railroad accident litigation. By Andrew J. Nellis. Albany, N. Y.: Matthew Bender. 1904. pp. cxii, 711. 8vo.

These two books cover practically the same ground and are in many points very similar. There is however a field for both of them, for our modern street railway has become such a predominating factor in present-day tort litigation that no one volume dealing with this topic can satisfy the demands of the profession.

The first of these two treatises is a second edition of an earlier work by the same author devoted exclusively to street railway accident law in Massachusetts. It is a revision and amplification of the former work, and is based upon the same general plan. The different topics are however treated much

more fully, and many new subjects are added, together with a full citation of cases from all jurisdictions. The book has thus become one of general rather than local application and service. It is particularly commendable for its analysis and classification of cases from the point of view of the relation of the plaintiff to the defendant.

The latter volume is also in a sense a second edition. It is based upon a portion of a more general work by the same author entitled "The Law of Street Surface Railroads." After quite a full treatment of the general basis of liability, the writer of this book follows a general plan similar to that of Mr. Clark. He goes perhaps even more carefully into the different details of the varying classes of cases. The material is not quite so thoroughly analyzed or paraphrased as that of the other volume, but it is rather more comprehensive and fundamental in its scope. The indexing of Mr. Nellis's book appears to have been very carefully done, and this renders its discussions especially accessible.

Neither of these two volumes can be said to excel the other. Neither is of any noteworthy originality. Both however are excellent and useful practical treatises and digests. Either can be honestly commended to any practitioner interested in this important branch of tort practice.

W. H. H.

AMERICAN RAILROAD LAW. By Simeon E. Baldwin. Boston: Little, Brown, and Company. 1904. pp. lxi, 770. 8vo.

Any work of Judge Baldwin will be read with interest by lawyers, and cannot fail to illuminate the subject with which it deals. In writing upon Railroad Law the learned author has chosen a subject of great present interest and importance. A railroad company is a corporation, and therefore subject to the rules that govern corporations and to the requirements of its charter; it is a common carrier, and therefore subject to the peculiar rules that govern public-service companies, and it is endowed with the power of eminent domain. To assemble the rules of law that apply to railroads it would be necessary to deal with three important branches of law, and it is of course impossible to do so in a single volume. Judge Baldwin has limited his work to what is peculiar to railroads, so far as that is possible without obscurity. The disadvantage of such a plan is this, that it rather gives a set of illustrations of the application of fundamental principles to one class of facts than a thorough discussion and determination of the principles themselves. In spite of Judge Baldwin's high capacity for legal analysis and reasoning, this book is a digest of railroad cases, excellently arranged and clearly phrased. Most of the important cases are cited, though one is surprised not to find such leading cases as *Northern Pacific Railroad v. Washington*, on the obligation to establish stations; *Old Colony Railroad v. Tripp*, on the right of hackmen to solicit passengers at the stations; *Boyce v. Anderson*, on the nature of the relation of passenger and carrier; *Norway Plains Co. v. Boston & Maine Railroad*, on the termination of the insurer's liability; *Railroad Company v. Reeves*, on loss by act of God. But the authorities are generally well collected, clearly arranged, and adequately stated, and the book should prove both suggestive and useful. In an appendix are collected a large number of forms which should prove very valuable to a lawyer in practice.

J. H. B.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack. Vol. XI. New York: The American Law Book Company. London: Butterworth & Co. 1904. pp. 1197. 4to.

This volume contains topics from "Costs" to "Credit with Banker" inclusive. Of the seven leading articles, the most pretentious are those on "Costs," "Counties," and "Courts," which together occupy five-sixths of the work. Dealing, therefore, for the most part with matters of practice and procedure rather than with substantive law, the volume cannot, from the nature of the case,

possess the interest of some of its predecessors. It is, however, distinguished by the same care and thoroughness in its preparation which characterized them. A considerable part of the work is devoted to the article on "Courts" by Joseph A. Joyce and Howard C. Joyce. This is particularly complete in its discussion of the federal courts, the jurisdiction of which is treated at length, with regard both to the general requisites of federal jurisdiction and to the individual jurisdiction of each court.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack. Vol. XII. New York: The American Law Book Company. London: Butterworth & Co. 1904. pp. 1194. 4to.

This volume includes topics from "Creditors' Suits" to "Damage Feasant." Three quarters of it is occupied by the article on "Criminal Law" by H. C. Underhill, assisted by William Lawrence Clark, both of whom are text-writers of ability and experience. This article, while touching upon particular crimes only incidentally and chiefly by way of illustration, nevertheless follows the recognized policy of the work in containing a full treatment of the various branches of the general subject. Thus, not only do the authors consider the nature and elements of the criminal act, but they also include a treatment of attempt, criminal jurisdiction, venue, and former jeopardy, together with a comprehensive discussion of criminal procedure and practice, which takes in the competency and weight of evidence. The article seems to be a thorough and careful exposition of the present state of the law, but the personal views of the authors appear rarely. As the work pretends to be little more than an accurate reflection of the authorities, criticism of this nature seems practically disarmed, but we should have been glad of an occasional expression of the personal opinions of authors so well known.

Other subjects most fully treated are "Customs Duties," "Customs and Usages," and "Creditors' Suits." The citation of authority is exhaustive, and, so far as we have had occasion to examine, accurate, and the volume as a whole is a work both able and painstaking. Whether it represents a substantial advance on other publications of a similar nature can be determined only after a more lengthy use.

THE BANKRUPTCY ACT OF 1898 annotated and explained with the amendments thereto, all the important and latest Federal and State Decisions thereon, and the general orders and forms established by the U. S. Supreme Court. By John M. Gould and Arthur W. Blakemore. Boston: Little, Brown, and Company. 1904. pp. xvii, 266. 8vo.

This book does not profess to be, nor is it, a treatise on the law of bankruptcy; nor does it attempt to deal with the particular problems raised by the present act. It must be characterized, as indeed the authors themselves in their preface have spoken of it, as a manual of the act and the points decided by the courts since its adoption. The sections of the act are presented in consecutive order, each section being followed immediately by annotations. This plan admits of ready reference for the purpose of determining what points of a particular section have been passed upon. The annotations, while concise, are nevertheless clear and accurate. Important differences between the present and previous bankruptcy statutes are pointed out. The act and its annotations are very appropriately supplemented by a presentation of the general orders and forms in bankruptcy as adopted and established by the Supreme Court of the United States. The work will undoubtedly prove of service to the bankruptcy practitioner.

C. H. O.

AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES. By Henry Flanders. Fifth Edition, Revised and Enlarged. Philadelphia: T. & J. W. Johnson & Co. 1904. pp. xii, 326. 16mo.

According to the preface of this work, the purpose was "to supply a convenient manual of instruction to the youth of our country; to make clear and intelligible to the unprofessional reader the fundamental law of our Federative system of government; and at the same time to produce a work which might also be useful to the bar." The author has succeeded in his first two endeavors; the well-arranged, clear-cut, and concise treatment of the provisions of the Constitution commend it to the elementary student of government or to the unprofessional reader as a safe, non-technical, working summary. The fifth edition corrects it to date, and includes some new matter, for example, questions connected with the acquisition of territory from Spain. In furthering these two purposes, however, the author has largely, and perhaps necessarily, sacrificed his third, which was to help the practising lawyer. The summary treatment in the text coupled with the absence of citations of authorities—only some half-dozen cases are cited—make the book of little use to the careful student of constitutional law.

THE INTERSTATE COMMERCE ACT and Federal Anti-Trust Laws including the Sherman Act; the Act Creating the Bureau of Corporations; the Elkins Act; the Act to Expedite Suits in Federal Courts; Acts Relating to Telegraph, Military, and Post Roads; Acts Affecting Equipment of Cars and Locomotives of Carriers Engaged in Interstate Commerce, with All Amendments. With Comments and Authorities. By William L. Snyder. New York: Baker, Voorhis & Company. 1904. pp. xxiii, 380. 8vo.

NOTES TO THE SPANISH CIVIL CODE showing changes effected by American legislation, with citation of cases from Philippines Supreme Court. By Charles A. Willard. Manila: E. C. McCullough & Co., Inc. 1904. pp. xi, 106. 8vo. With which is bound a Translation of the Civil Code in force in Cuba, Porto Rico, and the Philippines. Division of Customs and Insular Affairs. War Department. Washington: Government Printing Office. 1899. pp. vi, 322. 8vo.

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CODE REMEDIES: Remedies and Remedial Rights by the Civil Action according to the Reformed American Procedure. A Treatise Adapted to Use in All the States and Territories where that System Prevails. By John Norton Pomeroy. Fourth Edition. Revised and Enlarged by Thomas A. Boyle. Boston: Little, Brown, and Company. 1904. pp. clxx, 983. 8vo.

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PROBATE REPORTS ANNOTATED: Containing Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law. With Notes and References. By George A. Clement. Vol. VIII. With Index to Vols. I to VIII Inclusive. New York: Baker, Voorhis & Company. 1904. pp. li, 838. 8vo.

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- THE UNITED STATES AND PORTO RICO, with special reference to the problems arising out of our contact with the Spanish American civilization. By L. S. Rowe. New York: Longmans, Green, and Co. 1904. pp. xiv, 271. 8vo.
- REPORT OF THE TWENTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION held at Hot Springs, Virginia, August 26, 27 and 28, 1903. Philadelphia: Dando Printing and Publishing Company. 1903. pp. 822. 8vo.
- THE TEACHING OF SIR HENRY MAINE. An Inaugural Lecture Delivered in Corpus Christi College Hall on March 1, 1904. By Paul Vinogradoff. London: Henry Froude. 1904. pp. 19.
- PROTECTION IN GERMANY. A history of German fiscal policy during the nineteenth century. By William Harbutt Dawson. London: P. S. King & Son. 1904. pp. 259. 8vo.
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EQUITABLE CONVERSION.¹

II.

CARE should be taken to distinguish accurately between the two purposes for which a testator may direct a sale of his land, namely, that of disposing by the will of the proceeds of the sale, or of some part thereof, or of some interest therein, and that of satisfying a lien or charge on the same land, particularly when such lien or charge is created by the same will which directs the sale. Between these two purposes there is the same distinction as between being the owner of property and being a creditor of such owner. A lien or charge is in its nature a real obligation,² and it is so called because it binds a thing (*res*) in the same manner as a personal obligation binds a person. The word "lien" has, indeed, the same meaning and the same origin as the word "obligation," though it is commonly used only to designate an obligation which is real. A personal obligation, while it imposes a burden on one person, confers upon another person a correlative right to have that burden carried. The burden which an obligation imposes is called a debt³ (*debitum*), the person upon whom the burden is imposed is called a debtor (*debitor*), and is said to owe the debt, while the person

¹ Continued from 18 HARV. L. REV. 22.

² As to real obligations, see 13 HARV. L. REV. 539.

³ The reader will perceive that the term "debt" is here used in its broad Roman sense, not in its technical and narrow English sense.

upon whom the correlative right is conferred is called a creditor, and to him the debt is owed. Whenever, therefore, there is a debt of any given amount, there must always be a creditor as well as a debtor, and each for the same amount as the debt, and whenever either of the three ceases to exist, the other two cease to exist also. Moreover, what is thus true of a personal obligation is also true of a real obligation, except that in a real obligation the burden is imposed upon a thing. Accordingly, wherever there is a charge on land, there must necessarily be a person to whom the amount of the charge is owed, as well as land which owes it.

A real obligation is either legal or equitable. When it is legal, it binds the property even in the hands of a purchaser for value and without notice; when it is equitable only, it ceases to bind the property the moment the latter comes into the hands of a person who pays value for it, and who is not chargeable with notice that it is subject to an obligation. A rent-charge is an instance of a real obligation which is legal. A lien or charge on land created by will is, however, equitable only, unless some legal estate or interest be devised to secure its payment.

Where a testator, instead of imposing a lien or charge on the land which he directs to be sold, bequeaths to some person a portion of the proceeds of the sale, the rights of the legatee will be those of a co-owner, not those of a creditor, — *i. e.*, they will be absolute rights, not relative rights.¹ The rights of an owner of property are in some respects superior to those of a creditor of the same property, while in other respects they are inferior. For example, if the property increases in value the owner will enjoy all the benefit of the increase, while if it decreases in value all the burden of the decrease will fall upon him, a creditor, whose debt is a charge on the property, having no interest either in its increase or decrease in value so long as it is sufficient to pay his debt. So long as the payment of the debt is sure, the value of the creditor's rights is fixed and invariable, while the value of the owner's rights constantly fluctuates with the fortunes of the property. Hence, if a testator wishes to create a charge on his land, he must fix the amount of it,² — which he generally does by naming its amount in lawful

¹ For the distinction between absolute rights and relative rights, as those terms are here used, see 13 HARV. L. REV. 537, 546, n. 1.

² The amount of the charge need not, however, appear on the face of the will; it is sufficient if the will furnish the means of ascertaining its amount. Thus, in *Cook v.*

money, — while if he wishes to give a portion of the produce of the land which he directs to be sold he must designate such portion as some fractional part of the whole. If, therefore, a testator direct his executors to sell his land and pay one tenth of its total produce to A, A will be co-owner of such produce, and it is impossible that he should be anything else, while if the direction to the executors be to pay A \$1000 out of the produce of the land, the \$1000 will constitute a charge on the land, and A will be a creditor of the land for that amount, and it is impossible that he should be anything else.¹ It will be seen, therefore, that a pecuniary legacy is always and necessarily a charge, and so the legatee is in the nature of a creditor, though of course he ranks behind the testator's own creditors. If a pecuniary legacy be given, without any indication of the fund out of which it shall be paid, it will constitute a charge on the testator's entire personal estate, out of which alone it will be payable. If the testator declare that the legacy shall be paid out of the produce of his land, it will then constitute an equitable charge on the land, either in aid of the personal estate, or *pro rata* with it, or exclusive of it, according to circumstances.

If a testator give to A one tenth of the produce of land which he directs to be sold, such one tenth exists independently of the testator, and of course independently of the gift which he makes of it, *i. e.*, it exists in the form of land until the land is sold, and then in the form of produce of the land. Any failure, therefore, of the gift to A, whether because of his death during the testator's life, or for any other reason, will have no other effect upon the

Stationer's Co., 3 M. & K. 262, a testator devised his land to his executors in trust to sell enough, with the aid of his personal estate, to purchase £10,700 of 3 per cent consols. The amount of the charge, therefore, would depend upon the price of consols when the purchase was made. This case is also cited, *infra*, p. 91.

¹ In *Page v. Leapingwell*, 18 Ves. 463, a testator devised land to trustees in trust to sell the same, but not for less than £10,000, and out of the proceeds to pay four legacies, amounting in all to £7800, and to pay the residue to A; and the land having been sold for less than £10,000, Sir W. Grant, M. R., held that each of the five legacies must be deemed specific, *i. e.*, a fractional part of the £10,000, and therefore all must abate ratably. It seems, however, very difficult to sustain this view. 1. It is not obvious what authority there was to sell the land for less than £10,000 without the consent of all parties in interest. 2. If the land had been sold for more than £10,000, it seems clear that A would have been entitled to all that remained after deducting £7800. 3. The testator says, in the most explicit terms, that the four legatees are to receive in the aggregate £7800, and there is nothing in the will to raise a doubt that the testator meant what he said. He does not intimate what amount A will receive.

one tenth intended for A than to cause it to remain with the testator's heir, instead of being taken from him for the benefit of A. So, if the testator give to A, or to A, B, and C successively, limited interests in the whole of the produce of the land which he directs to be sold, and make no further disposition of such produce, the consequence will be that the reversionary interest therein, expectant on the termination of the interest of A, or of A, B, and C, will be undisposed of by the testator and so will remain with his heir. But if, on the other hand, a testator give to A \$1000 out of the produce of the land which he directs to be sold, the \$1000 will be purely the testator's own creation, and therefore it will have no existence until the testator's death, and it will not come into existence even on the death of the testator, unless it then vests in A. If, therefore, A die before the testator, or even before the right to receive the \$1000 vests in him, such right will never come into existence, and the land will devolve as if no such gift had been made by the testator. So, if the testator give to A, or to A, B, and C successively, a life interest in \$1000, and make no disposition of the ultimate interest, the consequence will be that the \$1000 will cease to exist as a separate interest on the death of A, or of A, B, and C, and that, too, whether it had been actually raised or whether it still remain a charge on the land, the interest only having been raised and paid. If the \$1000 have been raised, it will belong, on the expiration of the life interest or interests, to the owner of the land at whose expense it has been raised, though, of course, it will be money in his hands; if it have not been raised, it will sink into the land for the benefit of its owner, *i. e.*, it will cease to be a charge on the land.

In short, in the case of a testamentary charge on land, any failure of the testator to make a complete and effective gift of the entire sum charged will also cause a failure to the same extent of the charge itself; and the fact that the money charged has been actually raised, if such be the fact, will have no other effect upon so much of it, or of such interest in it, as is not disposed of, than to convert the land to that extent into money, leaving the ownership of the money, however, where the ownership of the land would have been if the money had not been raised. It may be added that a direction by a testator that a sum of money charged by him on his land be paid to his executor as such is not a valid disposition of the money charged, and hence it does not make the charge valid. A gift to one's own executor as such is, indeed, no

more than a gift to oneself, and therefore amounts only to an illegal and invalid attempt to cause one's land, to the extent of the gift, to devolve as if it were personal estate.¹

The reader must not infer from what has been said that a debt, in order to be the subject of a testamentary charge, must be created by the will which creates the charge, nor even that it must be in existence when the will is made, for it is, in fact, not material how or when the debt is created, it being sufficient that it is in existence when the testator dies. Nothing, indeed, was formerly more common in England than for a testator, by his will, to charge his land with the payment of all his debts, the reason being that simple contract debts of a deceased person were formerly not payable by law out of his land, and hence must go unpaid, in case his personal estate was insufficient to pay them, unless he made provision by his will for their payment out of his land. For similar reasons, it is very common for a testator to charge his land generally with the payment of all his pecuniary legacies, such legacies being otherwise payable out of his personal estate alone.

Plain as the foregoing distinctions seem to be, they have not always been recognized or acted upon by the courts.

Thus, in *Cruse v. Barley*,² the testator directed the residue of the proceeds of a sale of his land, with the residue of his personal estate, to be divided among his five children, the eldest son to receive £200 at twenty-one, and the remainder to be divided equally among the other four; and the eldest son having died under twenty-one, the court held that the £200, so far as it consisted of the produce of the land, went to the only surviving son and heir. It is clear, however, that the £200 constituted a charge on the entire residue, and hence must have been paid in full, though the other four children had received nothing, and the eldest son could not be a creditor of the estate for £200 and, at the same time, a part owner of it in respect to the same £200.

So in *Emblyn v. Freeman*,³ where land was conveyed by deed in trust to sell the same after the grantor's death, and divide the surplus proceeds equally among persons named, after deducting £200 — which, however, was not disposed of, the court held that the £200 went to the grantor's heir. It seems clear, however, that, as

¹ *Arnold v. Chapman*, 1 Ves. 108; *Henchman v. Attorney-General*, 2 Sim. & S. 498, 3 M. & K. 485.

² 3 P. Wms. 20.

³ Ch. Prec. 541.

no disposition was made of the £200, there was no authority to deduct it for any purpose.

In *Arnold v. Chapman*,¹ where the testator in terms charged his land with the sum of £1000, but made no valid disposition thereof, the court held that the £1000 went to the testator's heir; and yet it seems certain, first, that no debt was created, inasmuch as there was no creditor, and secondly, if a debt was created, that it could not devolve by operation of law, nor otherwise than as directed by the will. In other words, it could not devolve upon the heir. In *Henchman v. Attorney General*,² which was like *Arnold v. Chapman*, except that the testator left no heir, the court (which seems to have been much embarrassed by the decision in *Arnold v. Chapman*) was compelled to hold that the charge sank for the benefit of the devisee of the land.

In *Hutcheson v. Hammond*³ it was held that the amount of a lapsed pecuniary legacy of £1000, payable out of the proceeds of a sale of land directed by the testator, went to the heir, although the will contained an express bequest of the residue of such proceeds.

In *Hewitt v. Wright*,⁴ land was conveyed by deed to trustees, charged with £1500, which the trustees were to raise, on the death of the grantor and his wife, and invest and pay the interest, in the events which happened, to the grantor's daughter, D., for her life, and no further disposition was made of the £1500, — which was raised, invested, and the interest paid as directed; and it was held that on the death of D. the personal representative of the grantor was entitled to the £1500. This was equivalent to holding that the grantor, immediately on the delivery of the deed, acquired a right, on the death of the survivor of himself and wife, to have the £1500 raised for his own benefit, subject only to the right therein of D. In truth, however, D. was the only person who ever had such a right, and it was only to the extent of her right that the £1500 was ever a burden on the land. Hence, if D. had died before the money was raised, the land would have been wholly discharged from the burden. Having been raised, therefore, the money belonged to the owner of the land, subject to D.'s rights therein, and on the death of D. it went back to the land, *i. e.*, to its owner.

¹ 1 Ves. 108.

² 3 Bro. C. C. 128. See this case *infra*, p. 92.

³ 1 Bro. C. C. 86.

⁴ 2 Sim. & S. 498, 3 M. & K. 485.

In *Collins v. Wakeman*,¹ where a testator charged his land with £1000, of which he made no disposition, it was held that the heir was entitled to the £1000, the court assuming that there was no difference, in respect to the claim of the heir, between such a gift and a gift of one tenth (for example) of the produce of the land directed by the testator to be sold.

In *Jones v. Mitchell*,² where a legacy of £800, payable out of the proceeds of a sale of land directed by the testator, was given to trustees for charities, and the gift was therefore void, its nullity was held to inure to the benefit of the testator's heir, notwithstanding that the will contained an express bequest of the residue of such proceeds.

In *Amphlett v. Parke*, it was held by Lord Brougham,³ reversing the decree of Sir J. Leach, V. C.,⁴ that the amount of certain lapsed pecuniary legacies, payable out of the proceeds of a sale of land directed by the testator, went to the testator's heir, notwithstanding that the will contained an express bequest of the residue of such proceeds.

In *Watson v. Hayes*,⁵ where a testator devised land in trust to be sold, and the proceeds divided among his five children, after reserving a sum, the interest of which would pay an annuity of £400 to his wife for her life, and the wife died before the land was sold, the court held that the sum which should have been reserved went to the heir. It seems clear, however, that the testator intended to give the land to his five children, subject only to a charge of the annuity. If, therefore, the land had been sold, and a sum reserved as directed, such sum would have belonged to the children, though the wife would have been entitled to have it held by the trustees during her life to secure the payment of her annuity. The land not having been sold, and the annuity having expired, the case in favor of the five children was still stronger. Even if it should be held that the gift to the five children did not include the sum to be reserved, it is not obvious what authority the trustees would have had to reserve any sum out of the proceeds of a sale, except to secure the payment of the annuity.

In *Burley v. Evelyn*,⁶ where a testator gave £5000, out of the

¹ 2 Ves. Jr. 683.

² 1 Sim. & S. 290. See this case *infra*, p. 92.

³ 2 R. & M. 221. See this case *infra*, p. 93.

⁵ 5 M. & Cr. 125.

⁴ 1 Sim. 275.

⁶ 16 Sim. 290.

proceeds of land directed by him to be sold, to A for life, with remainders void for remoteness, and gave the residue of such produce to B, it was held that the void remainders went to the heir, though the truth seems to have been that, on the land's being sold, the entire proceeds of the sale vested in B, subject to a charge thereon of £5000, in favor of A, for his life.

In *Croft v. Slee*,¹ a testator gave the Swan Inn to his heir, charged with £500 in favor of the testator's wife, who however died before her interest, which was only for her life, had vested; but, she being also residuary legatee, her executor filed a bill against the heir to have the £500 raised and paid as part of the testator's personal estate, and, though the bill was properly dismissed, yet Sir R. P. Arden, M. R., said that, If the wife had died after her interest had vested, and the £500 had been raised and invested, it would have become, on the wife's death, a part of the testator's personal estate, and the wife's executor would have been entitled to it as such. Moreover, *Simmons v. Pitt*,² which does not differ substantially in its facts from *Croft v. Slee*, contradicts even the decision in the latter; for in both cases alike a sum of money charged on land had not been raised, and in both the question was whether a sum of money, in respect of which the charge had failed, should be raised, and in *Simmons v. Pitt* it was held that it should. For what purpose? In order that it might be paid to the personal representative of him who created the charge and who died intestate. The fact that the charge was created by virtue of a power was not material, for the power itself was created by the person who exercised it. The settlor in a marriage settlement reserved the power to himself, and therefore it was just the same as if he had created the charge directly in the marriage settlement, instead of doing it indirectly. So far, therefore, as the gift of the money charged on the land was incomplete or invalid, the charge failed, and the failure inured to the benefit of the owner of the land, namely, the heir of him who created the charge. As has already³ been seen, a charge on land is never of any efficacy, except so far as there is an effective and valid gift of the money charged. To say otherwise would be to say there can be an obligation and an obligor without an obligee.

On the other hand, in *Wright v. Row*,⁴ it was held that an annuity charged on land in favor of a charity, and consequently void,

¹ 4 Ves. 60.

² L. R., 8 Ch. 978.

³ *Supra*, p. 86.

⁴ 1 Bro. C. C. 61.

sank for the benefit of the devisee of the land. *Barrington v. Hereford*,¹ *Jackson v. Hurlock*,² *Baker v. Hall*,³ *Sutcliffe v. Cole*,⁴ *Tucker v. Kayess*,⁵ and *Heptinstall v. Gott*⁶ are also to the same effect.

So in *Cook v. Stationer's Co.*,⁷ where a testator devised his land in trust to sell enough, with the aid of his personal estate, to purchase £10,700 of 3 per cent consols, his gift of £3300 of which, being to charities, was void, and the testator gave all the residue of his property to his wife, it was properly held that the gift to the charities sank for the wife's benefit, though some of the reasoning of Sir J. Leach, M. R., is not very satisfactory nor very intelligible.

In *Salt v. Chattaway*,⁸ it was properly held that, while a lapsed share of the testator's residuary estate, so far as it consisted of the produce of his real estate, went to the heir, the lapse of a pecuniary legacy inured to the benefit of the residuary legatee.

In *In re Cooper's Trusts*,⁹ where a testator devised land, subject to a charge of £1000 in favor of his daughter E. for life, and died in 1816, and the £1000 was raised in 1840, and the daughter died in 1844, it was properly held that the £1000, when raised, belonged to the then owner of the land, subject to E.'s life interest therein, but that it devolved henceforth as money.

In *In re Newberry's Trusts*,¹⁰ where land was charged by will in 1829 with the sum of £1000 in favor, in the events which happened, of the testator's daughter for life, and then of the daughter's husband for life, and the testator died in 1833, and the money was then raised, and the daughter lived till 1868, and her husband till 1869, it was held that the £1000 from the time when it was raised belonged to the owner of the land, subject to the life interests of the daughter and her husband, but that it was money in his hands, and hence, on his death in 1865, the money devolved on his personal representative.¹¹

Sometimes a testator who directs a sale of land combines the two objects before mentioned, *i. e.*, first directs a fixed amount to

¹ Cited 1 Bro. C. C. 61.

² 2 Eden 263, Amb. 487.

³ 12 Ves. 497.

⁴ 3 Dr. 135.

⁵ 4 K. & J. 339.

⁶ 2 J. & H. 449.

⁷ 3 M. & K. 262. This case is also cited *supra*, p. 84, n. 2.

⁸ 3 Beav. 576.

⁹ 4 De G., M. & G. 757.

¹⁰ 5 Ch. D. 746.

¹¹ See also *Heptinstall v. Gott*, 2 J. & H. 449.

be paid out of the proceeds of the sale in the form of pecuniary legacies or otherwise, and then gives the residue of such proceeds to some other person or persons, and in such cases, if any part of such fixed amount fails, by lapse or otherwise, the failure inures to the benefit of the person or persons to whom the residue of the proceeds of the sale is given, just as it would inure to the benefit of the testator's heir or devisee if such a residue had not been disposed of. This principle ought to have been applied in the case of *Kennell v. Abbott*,¹ where the testator gave the residue of the proceeds of a sale of land directed by him to his niece, B. K., whom he also made his general residuary legatee; but the court held instead that the latter took such residue as general residuary legatee.

In *Hutcheson v. Hammond*² a lapse of a pecuniary legacy was held to inure to the benefit, neither of the person to whom the residue of the proceeds of the sale was given, nor to the residuary legatee, but to the heir.

So in *Jones v. Mitchell*,³ where a testator gave £800 out of the proceeds of land which he directed to be sold to trustees for charities, and the residue of such proceeds to J. R., it was held that the nullity of the gift of the £800 inured to the benefit, not of J. R., but of the testator's heir.

In *Page v. Leapingwell*,⁴ in which £200 of the proceeds of a sale of land directed by the testator was given to charities, it was held that the £200 sank for the benefit, not of A, to whom the residue of such proceeds was given, but to the testator's general residuary devisee and legatee. According, however, to the view adopted by the M. R., namely, that the gift to charities was not the fixed sum of £200, but one fiftieth of the entire proceeds of the sale, the consequence of the failure of the gift was that the one fiftieth went to the testator's heir.

In *Noel v. Lord Henley*,⁵ where a testator devised land to trustees in trust to sell the same and pay to his wife, whom he also appointed his residuary legatee, the sum of £5000 out of the proceeds of the sale, and the wife died during the testator's life, it was held successively, by the Court of Exchequer and the House

¹ 4 Ves. 802.

² 3 Bro. C. C. 128. See this case *supra*, p. 88.

³ 1 Sim. & S. 290. See this case *supra*, p. 89.

⁴ 18 Ves. 463.

⁵ 7 Price, 241, Daniel, 211, 322.

of Lords, that the £5000 sank for the benefit of the legatees of the residue of such proceeds.

In *Amphlett v. Parke*¹ a testatrix devised land to her executors in trust to sell the same, and pay legacies out of the proceeds of the sale, and then gave the residue of such proceeds to one of said trustees on certain trusts; and some of the legatees having died during the life of the testatrix, Sir J. Leach, V. C., held, though for unsatisfactory reasons, that their legacies sank for the benefit of the residuary legatee of such proceeds, but Lord Brougham, on appeal, held that the amount of the lapsed legacies went to the heir. There was an appeal to the House of Lords, but the case was compromised, the heir and the legatee of the residue dividing the fund between them.

In *Green v. Jackson*² a testator devised land to his executors in trust to sell the same and apply certain specified sums to charities and the residue of the proceeds of the sale for the benefit of certain persons named, and the gift to the charities being void, it was held, though for unsatisfactory reasons, that the nullity of those gifts inured to the benefit of the legatees of the residue of the proceeds of the sale.

There is also another distinction between a direction by a testator to sell his land for the purpose of making a gift of the proceeds of the sale, and a direction by him to sell the same land for the purpose of satisfying a charge thereon, namely, that, in the former case, the direction constitutes the sole authority for making the sale, and is therefore indispensable to the validity of the gift, while, in the latter case, the purpose of the testator will be entirely accomplished by making a gift of the money, and charging the same on the land, as he will thereby subject the land to a real obligation, and the regular and appropriate mode of enforcing such an obligation is by selling the thing which is subject to it. Still another distinction is that, in the former case, however small a portion of the proceeds of the sale the testator may give away, the heir will have no means of preventing a sale of the whole of the land, as it is only by such sale that the amount of money to which the legatee will be entitled can be ascertained, while, in the latter case, the heir can always prevent a sale of any of the land by paying the amount charged on it, as the obligation to which the land is subject will thus be extinguished.

¹ 1 Sim. 275, 2 R. & M. 221. See this case *supra*, p. 89.

² 5 Russ. 35, 2 R. & M. 238.

As the validity and effect of every testamentary direction to sell land and of every testamentary charge on land depends so largely upon the testamentary gift or gifts which are made of the proceeds of such sale and of the money so charged, it becomes important to ascertain how, *i. e.*, by what words, such gift or gifts can be made.

A testamentary gift of the produce of land directed by a testator to be sold partakes of the nature partly of a gift of land and partly of a gift of personal property. On the one hand, the property is in the form of land when the testator dies, and therefore the executor has nothing to do with it. The land descends to the heir unless it is devised to a trustee to be sold, and remains vested in the heir until it is sold, and the legatee receives his legacy, either through the trustee to whom the land is devised, or through the person who is directed to make the sale. Moreover, a gift of the produce of land directed to be sold will include, by implication, a gift of the rents and profits of the land, until the sale is made, unless there be an express gift of such rents and profits. From the testator's death also to the time of the sale a right is vested in the legatee to have the land sold. On the other hand, the equitable ownership of the land never vests in the legatee, but remains in the heir from the testator's death until the sale, subject to the right of the legatee to receive the rents and profits, as just stated, and the legatee receives the corpus of his legacy in the form of money. For most practical purposes, therefore, the gift is a gift of personal property, but of personal property which does not belong to the testator at the time of his death. By what form of words, then, can such a gift be made?

It is the office of a will, as it is of a deed, to transfer property, the most important difference between the two being that a deed takes effect upon delivery, while a will takes effect only upon the death of the testator. Presumptively a will, like a deed, produces, the moment that it becomes operative, all the effect that it ever produces, *i. e.*, it transfers all the property which the testator, at the moment of his death, is capable of transferring, and which he shows an intention to transfer. Moreover, to show an intention to transfer all the property which the testator shall at his death be capable of transferring, the best way is for him to use the fewest and most comprehensive words of description. For example, these three words, "all my property," will be sufficient in every case that can happen. If, however, the testator expects his will

to produce an effect, not at his death, but at some subsequent time, and especially if the effect be such as the testator is not capable of producing at the time of his death, he must declare his intention by specific and appropriate words. If, for example, a testator, instead of devising his land beneficially, which he could do by the three words just named, wishes to have the same sold after his death, and to have the money thus obtained divided among certain persons, he must give the requisite authority and direction to sell the land, and must then give the money to those whom he wishes to have it, or direct it to be divided among them, and if he should simply authorize and direct a sale of his land, and then say, "I give all my property to A, B, and C to be divided among them equally," A, B, and C would take all his property in the condition that it was in at his death, and his direction to sell his land would go for nothing.

If, then, a testator should authorize and direct his executors to sell his land, and divide the proceeds of the sale among A, B, and C equally, and should appoint D his residuary legatee, and A should die during the testator's life, what would become of the one third of the proceeds of the sale of the land which the testator intended for him? I trust the reader will have no doubt as to how this question should be answered, namely, that the one third will go to the testator's heir. It is certain that D can make no claim to it; nor could he if the testator had said: "If any of my property shall not be otherwise effectively disposed of by this my will, I give the same to D," unless, indeed, such a gift would be a devise to D of one third of the testator's land. To enable D to say the testator had given to him the one third of the proceeds of the sale of the land which was intended for A, the gift to D must contain words showing that the testator had the proceeds of his land distinctly in his mind and intended to include them in his gift, so far as they should be otherwise undisposed of.

Next, suppose a testator give to A, B, and C \$1000 each, and charge the same on his land, either in aid of his personal estate, or concurrently with it, or exclusively of it, and appoint D his residuary legatee, and A dies during the testator's life. What will become of the legacy intended for A? The true answer seems to be that nothing will become of it, as it will never have any existence. The only consequence of A's death will be that there will be more property by \$1000 for some one else than there would otherwise have been. The legacies to A, B, and C differ from

pecuniary legacies pure and simple only in having additional security for their payment, and in the fact that, so far as they fall upon the testator's land, his executor as such will have nothing to do with them, and neither of these circumstances is at all material for the present purpose. A's death, therefore, like the death of any pecuniary legatee before his legacy vests, will leave everything respecting the testator's estate just as it would have been if no legacy had been given to A. To whose benefit, then, will the lapse of A's legacy inure? So far as it would have fallen upon the personal estate, its lapse will inure to the benefit of D; *i. e.*, his residuary bequest will be so much larger. So far as A's legacy would have fallen upon the testator's land, its lapse will inure to the benefit of the testator's heir, *i. e.*, by the extinguishment of the obligation to which the land would otherwise have been subject. If the land had been devised beneficially, of course the lapse would have inured to the benefit of the devisee instead of the heir. It could not possibly inure to the benefit of D, except as already stated. How could the testator have prevented the lapse from inuring to the benefit either of D or of the testator's heir? Only by giving to some one else a legacy of the same amount as that intended for A, and charged on the land in the same manner.

It will be seen, therefore, that a lapse, whether of a gift of a portion of the produce of land directed to be sold, or of a pecuniary legacy exclusively charged on land, will inure to the benefit of the person to whom the land, subject to the direction to sell it, or subject to the charge, shall devolve at the testator's death, unless the testator shall do something to prevent such a result, though the reasons in the two cases will be entirely different. How then can a testator divert the benefit of a lapse, or other failure, of the gift, in these two classes of cases, from the person to whom the land will devolve, to the testator's residuary legatee? In cases of the first class he can do this by simply including in his residuary gift so much, if any, of the money, produced by the sale of his land, as shall not be otherwise effectively disposed of by his will. But, though such an intention is not improbable, and may be easily expressed and in a great variety of ways, yet it must be expressed in some way, — it can never be inferred. In cases of the second class, however, it seems that the testator cannot divert the benefit of the lapse, from the person to whom the land will devolve, to his residuary legatee *as such*; for, as he can give the benefit of the lapse to another person only by giving him a legacy of the same

amount, and by charging it upon the land in the same manner, if he give such a legacy to his residuary legatee, the latter will not take it as residuary legatee, but as any other person would take it, so that he will fill the two characters of residuary legatee and pecuniary legatee. The fact, therefore, that one is a residuary legatee will not aid him, in the least, in proving that he also has a pecuniary legacy charged on land, and he must therefore adduce the same evidence that would be required of any other person, *i. e.*, he must show that the testator has given him a pecuniary legacy, of the same amount as that intended for A, and has charged it upon his land in the same manner.

Such, it is conceived, are the principles which govern these two classes of cases. The authorities, however, are in a very unsatisfactory condition. Unfortunately, when the question first arose, the erroneous view still prevailed that the produce of land directed by will to be sold constituted a part of the testator's personal estate at the time of his death, and devolved as such under his will, and hence the early cases erroneously decided that such produce, if not otherwise effectively disposed of, would pass under an ordinary residuary bequest;¹ and, though the principle on which these cases were decided was long since repudiated, yet the cases themselves have never been in terms overruled, and they have continued to exert a most mischievous influence even to the present moment.

Thus, in *Kennell v. Abbott*,² and *Page v. Leapingwell*,³ the old view fully prevailed; for, in the former, it was held that the proceeds of a sale of land directed by a testator, so far as the same was not otherwise disposed of by the testator, went to his general residuary legatee; and in *Page v. Leapingwell*, in which a pecuniary legacy, payable out of the proceeds of a sale of land directed by the testator, was void by statute, it was held that the amount of that legacy passed to the general residuary legatee and devisee.

In *Maugham v. Mason*,⁴ Sir W. Grant, M. R., held that a residuary bequest did not carry the produce of land directed by the testator to be sold, but his decision did not affect the authority of the two earlier cases.

¹ *Mallabar v. Mallabar*, Cas. t. Talbot, 78; *Durour v. Motteux*, 1 Ves. 320, 1 Sim. & S. 292, n. (d).

² 4 Ves. 802.

³ 18 Ves. 463.

⁴ 1 V. & B. 410.

In *Byam v. Munton*,¹ it was held that a bequest of the residue of the testator's personal estate included the produce of land directed to be sold, but it was upon the strength of the context of the will. The same was also held, and for the same reason, in *Griffiths v. Pruen*.² There seems, however, to have been nothing in the context to warrant the decision, except that it shows that the testator intended to dispose of all his property. The proceeds of a sale of his land were not, however, a part of his property when he died, and there was nothing in the terms of his residuary bequest to indicate that he intended to include such proceeds. The inference rather was that he thought the latter would constitute a part of his personal estate when he died, and would *therefore* pass by the residuary clause. All the previous gifts were of pecuniary legacies, and it is clear that none of these could have been paid out of the proceeds in question, though the personal estate had been insufficient to pay them, and yet the testator clearly expected them to be paid out of his personal estate and out of such proceeds indiscriminately. There would seem to have been a much stronger reason for holding that the land itself passed by the residuary clause. It was not devised otherwise, but was simply directed to be sold; and as there was no gift of the proceeds of the sale, the direction to sell was invalid and inoperative. Moreover, the residuary clause was in its terms equally applicable to real and personal estate.

In *Spencer v. Wilson*³ it was held that the produce of land directed to be sold passed under the words "The residue of my said personal estate so converted into money," and this seems to have been a reasonable construction of the will. The testator directed a sale of all his land, and all the residue of his personal estate which did not consist of money, and payment of his debts, legacies, and life annuities, out of his money and the proceeds of said sale. Subject to these payments the residue of said personal estate so converted into money was to go to the testator's four natural children, each to receive his share when he attained twenty-one, or, in the case of daughters, married, the income of the share of each to be applied for his benefit in the meantime. The fund was, therefore, to remain in the hands of trustees for a considerable time, and the gift of it consisted entirely in directions to the trustees to pay or apply it. In giving directions to his

¹ 1 Russ. & M. 503.

² 11 Sim. 202.

³ L. R., 16 Eq. 501.

trustees, therefore, the testator naturally looked upon the property, not as it would be at the time of his death, but as having the quality which he expected it to have as and when his directions became operative. In fact, the testator's property consisted mostly of land, and it had all been sold and there was a large residue.

In *Court v. Buckland*¹ the testator directed his executors and trustees to sell his land, and so much of his residuary personal estate as should be of a salable nature, and get in the rest, and to dispose of the net money to arise from such real and residuary personal estate "according to the trusts hereinafter declared concerning the same." In fact, however, he afterwards declared no trusts of such net money, but only of his residuary personal estate. Still, it was held by Sir G. Jessel, M. R., that the trust thus declared included the proceeds of the sale of land, not because such proceeds were personal estate when the testator died, but because he thought himself authorized so to change the words just quoted as to make them read, "according to the trusts hereinafter declared concerning my residuary personal estate." It is submitted, however, that this was assuming a power which no court can rightfully exercise, namely, the power of making a will for a testator when he has failed himself to make such a will as he intended to make. The truth seems to be that the testator, in his residuary gift, used the words "residuary personal estate" by mistake, instead of the words "the net money arising from my real and personal estate."²

The most singular case of all, however, is that of *Watson v. Arundel*,³ in which the Irish Court of Appeal in Chancery and the House of Lords, successively and unanimously, held, reversing the decree of the court below, that a residuary legatee as such took the produce of land directed by the will to be sold, though the will contained in terms no disposition whatever of such proceeds, and afforded no evidence whatever that the testator used the term "residuary legatee" in any other than its legal sense. Upon this case I submit to the reader the following propositions: 1. The testator gave pecuniary legacies to an amount much exceeding the total amount of his personal estate, and, though he said noth-

¹ 1 Ch. D. 605.

² According to the report, the testator used the phrase "net money" three times, and the phrase "my residuary personal estate" five times, in his will.

³ Irish Reports, 10 Eq. 299, 11 *id.* 53; S. C. (*nom.* *Singleton v. Tomlinson*) 3 A. C. 404.

ing as to the property out of which such legacies should be paid, yet there is no reason to doubt that he expected them to be paid out of the produce of his land, at least in aid of his personal estate, and both courts held that the land was by implication charged with the payment of such legacies ratably with the personal estate. 2. The arguments in favor of the pecuniary legacies being a charge on the land have no bearing on the question whether the produce of the land was given to the residuary legatee. These arguments did, indeed, in the view that the courts took of them, have the effect of creating a fund for the residuary legatee by leaving for him a portion of the personal estate which would otherwise have been entirely exhausted by the pecuniary legacies; but they did not aid the courts in the least in enlarging that fund by including in it the residue of the produce of the land. Imposing an obligation upon land is an entirely different thing from giving the proceeds of the sale of the same land.¹ 3. The residuary clause contains in terms no gift of anything, but simply appoints a residuary legatee, the words being, "I constitute T. Tomlinson my residuary legatee." These, moreover, are the last words in the will, and, though they do not constitute an entire sentence, yet the previous part of the sentence has no connection with them in sense, it being merely a gift of certain specific articles to another person. Nor is the slightest light thrown upon the residuary clause by any part of the will, unless the direction to sell the testator's land be regarded as throwing light upon it. A direction by a testator, express or implied, to sell land is, indeed, a *sine qua non* of any gift of the proceeds of a sale of such land, but it does not constitute the smallest element in any such gift. 4. It inevitably follows that the residuary clause carried nothing except what was personal

¹ In *Wildes v. Davies*, 22 L. J., Chan. 495, a testator devised his land to his executors in trust to sell the same, and hold the proceeds, with the residue of his personal estate, on the trusts thereafter declared. In fact, however, he afterwards declared no trusts, but simply gave pecuniary legacies and appointed residuary legatees. It appeared from the will that the testator intended that his pecuniary legacies should be a charge on his land, and the question was whether the residue of the proceeds of the sale of the land should go to the residuary legatees or to the heir; and Stuart, V. C., failing to distinguish between a charge on land and a gift of the proceeds of the sale of land, declared that, as the pecuniary legacies were payable out of the proceeds of the sale of the land, there was a gift of such proceeds to the pecuniary legatees to the extent of their legacies, and hence the testator must have used the term "legacy" as including the proceeds of the sale of his land. His conclusion was, therefore, that the residue of such proceeds went to the residuary legatee.

It is submitted that the will sufficiently shows that the testator regarded the giving of legacies as a declaration of trust and, if so, all difficulty is removed.

estate prior to the testator's death, and therefore the decision proves that the testator's land was, by the direction to sell it, converted in equity into personal estate during the testator's life, *i. e.*, before the will took effect. 5. If, therefore, full effect is to be given to the decision, it places the law of the United Kingdom where it was prior to the case of *Ackroyd v. Smithson*,¹ *i. e.*, at the time when *Mallabar v. Mallabar* and *Durour v. Motteux* were decided.

In conclusion it may be said that *Court v. Buckland*, and *Watson v. Arundel* are conspicuous illustrations of the adage that "Hard cases make bad law."

I have hitherto treated only of the indirect mode of converting land into personal property, namely, that of selling the land; but, though this is the most common mode, and the one which is attended with the most important legal consequences, and is the only one which is connected with equitable conversion, yet there is a direct mode of converting land into personal property which requires some attention, namely, that which is effected by severing a portion of the land from the general mass, and thus converting the severed portion into a chattel.

These two modes of conversion differ from each other, not only in the particular just adverted to, but in other particulars also. The former not only requires the mental and physical co-operation of the respective owners of the things to be exchanged for each other, but also involves an interchange of the ownership of each, and this requires, in addition to the co-operation of the parties, the sanction of the law. The latter, on the other hand, involves only the physical act of severance, and that act may not only be performed by a single person, but may be performed by a total stranger to the land as well as by its owner, and hence may be wrongful as well as rightful. For the present purpose, however, it will be necessary to consider only such acts of severance as are rightful.

The most familiar instance of converting land into chattels by a rightful severance of a portion of the land from the general mass is the gathering of the annual crops. Until gathered, annual crops are a part of the land, but the moment they are severed from the land, they become personal property, and belong to the person by whom, or by whose authority, they are rightfully gathered. Rents also follow the analogy of annual crops, the reason probably being

¹ 1 Bro. C. C. 503.

that the annual rent of agricultural land anciently consisted of a portion of the crops. Hence rent not yet payable is a part of the land, but the moment it becomes payable it is personal property. When, therefore, a landowner dies, the land, with all rent and income thereafter to accrue, goes to the heir, while arrears of rent, with other income already accrued, go to the executor.¹

Another common instance of converting land into chattels by acts of severance is the cutting of timber. Timber differs from an annual crop in this, that, while the right to gather an annual crop, and the ownership of the crop when gathered, are regularly vested in the person for the time being rightfully in the possession of the land, the right to cut timber, and the ownership of the timber when cut, are regularly vested only in the owner of the inheritance (*i. e.*, in fee or in tail) in possession of the land. In the case of a settled estate, however, it frequently happens that timber requires to be cut, either because it is deteriorating in quality, or because it requires thinning, or for both of these reasons, and yet there is no person in existence who is authorized to cut it, the tenant in possession commonly being only tenant for life. In such cases, therefore, courts of equity have assumed jurisdiction to order the timber to be cut and sold, acting on behalf of all persons in interest.² The proceeds of the sale of the timber will, therefore, follow the same rule that would be followed by the proceeds of the sale of the land, if the land were sold, *i. e.*, it will follow the limitations of the settlement, until it comes to a person who has an estate of inheritance in possession in the land, — at which moment it will vest in such person absolutely, but as personal property. Thus, in *Hartley v. Pendarves*,³ where timber on an estate vested in A for life, with remainder to B in fee, was ordered to be cut, and the same was cut and sold, and the proceeds invested, and A received the dividends till her death,⁴ in October, 1888, and then B received them till his death, in June, 1894, it was held that the *corpus* of the fund devolved on his personal representative; and it would have been the same though B had been only tenant in tail. And though, in *Field v. Brown*,⁵ where timber was cut, by the order of the court, on an estate vested in A for life, remainder

¹ See Williams on Executors, Pt. II. Bk. III. Ch. I. § II. p. 724, 727 of 9th ed.

² See *Hartley v. Pendarves*, [1901] 2 Ch. 498, 500.

³ [1901] 2 Ch. 498.

⁴ See *Tooker v. Annesley*, 5 Sim. 235.

⁵ 27 Beav. 90.

to her issue in tail, remainder to B for life, remainder to his issue in tail, remainder to B in fee, and B died without issue, and his remainder in fee descended to A as his heir, and then A died without issue, it was held that the fund, in which the proceeds of the sale of the timber had been invested, passed with the land to A's heir, yet the decision was disapproved in *Hartley v. Pendarves*, where it was also intimated that the decision was inconsistent with the subsequent decision by the same judge in *Dyer v. Dyer*,¹ and that the judge committed the same error in *Field v. Brown* that he had previously committed in *Cooke v. Dealey*.²

If a tenant for life of a settled estate cut and sell timber without authority, the proceeds of the sale will follow the limitations of the settlement, just as if the cutting and selling had been pursuant to the order of a court of equity, except that the tenant for life will not be permitted to derive any benefit from his wrongful acts, and hence the entire proceeds of the sale will go to those who shall be entitled to the estate in remainder or reversion.³

Another common instance of converting land into personal property by acts of severance is the digging of mines. This mode of severing a portion of land from the general mass does not seem, however, to have given rise to any questions requiring special attention in this place.

Thus far, as the reader will have observed, while I have been writing under the title of "Equitable Conversion," I have in fact occupied myself exclusively with actual conversion, and with certain legal questions and distinctions upon which actual conversion and equitable conversion alike depend. Perhaps, therefore, the reader will say I have been wrong, either in the title that I have chosen, or in what I have written under that title; and, with a view to avoiding or mitigating such a criticism, I will state briefly my reasons for the course that I have taken.

I do not think I have made any mistake in selecting my title. I regard it as indispensable that a title should be brief, and also intelligible on its face. If my title had been "Conversion," it would have been brief, but it would not have been intelligible. I doubt, indeed, if many readers would have had any definite idea of what I proposed to write about if I had adopted that title. The term "Equitable Conversion," on the other hand, is both brief and intelligible. Moreover, my sole object has been, from the beginning,

¹ 34 Beav. 504.

² 22 Beav. 196.

³ *Powlett v. Duchess of Bolton*, 3 Ves. 374.

to write upon equitable conversion, and my only reason for admitting other topics has been that a consideration of them would facilitate the accomplishment of that object. I think, therefore, there is no doubt that "Equitable Conversion" was my proper title.

Nor do I think I have made any mistake in what I have written under the title of "Equitable Conversion." 1. As equity is in the nature of a supplement to the common law, no branch of equity can be thoroughly understood, unless its relation to the common law is understood. 2. When any branch of equity is founded upon or involves principles of law as well as principles of equity, every student should acquire a knowledge of the former before he attempts to master the latter. 3. The subject of equitable conversion involves all the legal principles and distinctions which have been discussed in the preceding pages. 4. All the cases which have been cited and discussed are always treated in the books as cases of equitable conversion. 5. The only question open to me, therefore, was whether I should deal with actual conversion and those legal principles and distinctions which are common to actual conversion and equitable conversion before taking up the latter, or whether, ignoring the subject of actual conversion, I should treat those principles and distinctions as a part of the doctrine of equitable conversion, and it seemed to me there could be no doubt that the former was my true course. 6. The reader may, therefore, regard the preceding pages as clearing the way for what may be considered as the proper subject of this series of articles.

C. C. Langdell.

CAMBRIDGE, October 15, 1904.

DISCHARGE OF CONTRACTS BY ALTERATION.

I.

IT was an early doctrine of the common law that alteration avoided a deed. The leading case is Pigot's Case,¹ and the doctrine is stated therein by Lord Coke, as follows:

"These points were resolved: 1. When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed.

"Secondly, it was resolved, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. . . . So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void: but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed.

"If a deed contains divers distinct and absolute covenants, if any of the covenants are altered by addition, interlineation, or rasure, this misfeasance *ex post facto*, avoids the whole deed, as it is held in 14 H. 8, 25, 26. For although they are several covenants, yet it is but one deed, 3 H. 7, fol. 5, a. If two are bound in a bond, and afterwards the seal of one of them is broken off, this misfeasance *ex post facto* avoids the whole deed against both. *Vide* the case of Matthewson, Mich. 39 & 40 Eliz. in the Fifth Part of my Reports, fol. 23 a."

Distinction between Conveyances and Covenants.

A distinction should be observed between a deed of conveyance and a bond or covenant obliging the maker to some future performance. If a conveyance is valid when delivered, the title to the property vests in the grantee, and no subsequent alteration² or

¹ 11 Coke 26 b.

² *Argoll v. Cheney*, Palmer 402; *Doe v. Hirst*, 3 Stark. 60; *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432; *West v. Steward*, 14 M. & W. 47; *United States v.*

loss¹ of the deed can affect the title of the grantee, though for want of evidence he may find difficulty in enforcing his title. A bond or covenant for future performance, however, must be valid when the obligee seeks to enforce it, and the rules in *Pigot's Case* are applicable.²

This distinction between conveyances and obligations, while clear on principle, was not that which the early English law adopted. As to conveyances of corporeal hereditaments where there was a transfer of possession, it was early held that a subsequent alteration could not divest a title which had passed by the deed,³ for it was said that the property lay in livery and the deed was but evidence of the transfer. But in the case of incorporeal hereditaments, which lie in grant, it was otherwise; the title was regarded as continuously dependent on the deed, and a subsequent alteration divested a title previously passing by the deed.⁴

West, 22 How. 315; *Mallory v. Stodder*, 6 Ala. 401; *Sharpe v. Orme*, 61 Ala. 263; *Ransier v. Vanorsdol*, 50 Ia. 130; *Hollingsworth v. Holbrook*, 80 Ia. 151; *Slattery v. Slattery*, 120 Ia. 717; *Barrett v. Thorndike*, 1 Me. 73; *Goodwin v. Norton*, 92 Me. 532; *Hatch v. Hatch*, 9 Mass. 307; *Chessman v. Whittemore*, 23 Pick. 231, 233; *Alexander v. Hickox*, 34 Mo. 496; *Woods v. Hilderbrand*, 46 Mo. 284; *Donaldson v. Williams*, 50 Mo. 407; *Holladay-Klotz Co. v. T. J. Moss Co.*, 89 Mo. App. 556; *Chesley v. Frost*, 1 N. H. 145; *Jackson v. Gould*, 7 Wend. 364; *Herrick v. Malin*, 22 Wend. 388; *Waring v. Smyth*, 2 Barb. Ch. 119; *Rifener v. Bowman*, 53 Pa. 318; *Booker v. Stivender*, 13 Rich. L. 85, 90; *Morgan v. Elam*, 4 Yerg. 375; *Stanley v. Epperson*, 45 Tex. 645; *North v. Henneberry*, 44 Wis. 306.

In *Argoll v. Cheney*, *Palmer* 402, a little boy had torn the seals off a deed to guide the uses of a recovery, but the effect of the deed was held not destroyed.

¹ *Bolton v. Bishop of Carlisle*, 2 H. Bl., 259, 263, *per* Eyre, C. J.: "God forbid that a man should lose his estate by losing his title deeds." *Donaldson v. Williams*, 50 Mo. 407.

² Compare with *Argoll v. Cheney*, n. 2, p. 105, *supra*, *Bayly v. Garford*, March 125, where the seal of two obligors had been eaten by mice and rats, and this was thought to discharge a third person jointly bound with them, though his seal was uninjured. See also *Michael's Case*, *Owen* 8; *Nichols v. Haywood*, *Dyer* 59 a; *Seaton v. Henson*, 2 Lev. 220, s. c. 2 Show. 28. The numerous modern decisions are cited *passim infra*.

³ Bro. Ab. "Lease," pl. 16; *Moore v. Waldron*, 1 Rolle 188; *Argoll v. Cheney*, *Palm.* 402; *Miller v. Manwaring*, *Cro. Car.* 397, 399; *Woodward v. Aston*, 1 Vent. 296; *Nelthorp v. Dorrington*, 2 Lev. 113; *Lady Hudson's Case*, cited in 2 Vern. 476, and *Ch. Prec.* 235; *Doe v. Hirst*, 3 Stark. 60.

⁴ *Miller v. Manwaring*, *Cro. Car.* 397, 399; *Moor v. Salter*, 3 Bulstr. 79. In *Miller v. Manwaring* the report reads: "And Jones and Berkley, Justices, . . . took a difference when an estate loseth his essence by a deed, *viz.*, where it may not have an essence without a deed, as a lease by a corporation, or of tithes, or grant of a rent-charge, or such like, if the deed be rased after delivery, it determines the estate and makes it void, but when the estate may have essence without a deed, there although it be created by a deed, and the deed is after rased by the party himself or a stranger,

By the present English law, however, a title once vested whether to corporeal or incorporeal property cannot be divested,¹ and probably the distinction of the earlier law would not now be followed in this country.²

The question of substantive law is complicated with a question of evidence. The original reason that a deed was discharged by alteration applied equally to the loss or accidental destruction of such an instrument. The deed was itself the obligation, not merely evidence of it, and if the deed ceased to exist in its original form the obligation necessarily ceased. But an obvious consequence of alteration, loss, or destruction was a difficulty of proving that a deed of a particular character had been made. In case of accidental loss³ or destruction⁴ courts of equity early gave relief, and later courts of law made equitable relief unnecessary by accepting secondary evidence of the deed and enforc-

that shall not destroy the estate although it destroys the deed." The court, therefore, held rasure in a lease did not avoid the lessee's estate. Croke's opinion was, however, that the rasure destroyed the deed and also the estate of the lessee, as by a surrender.

So in Gilbert on Evidence (1st ed. p. 84, 6th ed. p. 75), "There is a difference to be taken between things that lie in livery, and things that lie in grant, for things that lie in livery may be pleaded without deed, but for a thing that lies in grant regularly a deed must be shown." See also *ibid.* 1st ed. p. 109, 6th ed. p. 95.

In *Woodward v. Aston*, 1 Vent. 296, 297 (1677), "The Court said in this case that a rent or other grant was not lost by the destruction of the deed, as a bond or *chose en action* was. (*Quære*, if the party himself cancel it.)"

The Statute of Frauds introduced a new element into the case, since it made impossible the transfer or surrender (except by operation of law) of an estate without a writing. Consequently even voluntary cancellation of a lease granting an estate within the statute could not operate as a surrender. *Magennis v. McCulloch*, Gilb. Eq. 236; *Leech v. Leech*, 2 Ch. Rep. 100; *Roe v. York*, 6 East 86.

¹ The old distinction was criticised by Eyre, C. J., in *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259, 263: "I hold clearly that the cancelling a deed will not divest property, which has once vested by transmutation of possession, and I would go farther and say that the law is the same with respect to things which lie in grant. In pleading a grant, the allegation is that the party at such a time '*did grant*,' but if by accident the deed be lost, there are authorities enough to shew that other proof may be admitted. The question in that case is, Whether the party *did grant*? To prove this the best evidence must be produced, which is the deed: but if that be destroyed, other evidence may be received to shew that the thing was once granted."

² It was stated as law, however, in *Lewis v. Payn*, 8 Cow. 71.

³ *Griffin v. Boynton*, 2 Nelson 82; *Collet v. Jaques*, 1 Eq. Cas. Ab. 32, pl. 2; *Lightbone v. Weeden*, 1 Eq. Cas. Ab. 24, pl. 7; so in the case of a lost bill of exchange. *Tercese v. Geray*, Finch 301.

⁴ *Brown v. Savage*, Finch 184; *Bennett v. Ingoldsby*, Finch 262; *Brookbank v. Brookbank*, 1 Eq. Cas. Ab. 168, pl. 7; *Wilcox v. Stuart*, 1 Vern. 78; *Sanson v. Rumsey*, 2 Vern. 561, and note.

ing its provisions.¹ But alteration was regarded as due, if not to wrongdoing, at least to laches of the obligee or grantee, and equity gave him no relief.² If a court of law also would not receive in evidence the altered deed or secondary proof of its contents, the consequence would be to deprive any grantee or obligee of all legal rights in any case where such rights could be shown only by proof of the deed. Even if the deed vested an estate in the grantee prior to the alteration, no one would be bound to respect the title if the only legal evidence of it were destroyed. The case is analogous to that of the voluntary destruction of a conveyance by the grantee. Though this is not a reconveyance of the estate, the effect is similar if the grantee cannot prove his title nor show that the grantor's title has been divested. The rule of evidence is often broadly enough stated to lead to these results. In the last edition of Greenleaf on Evidence it is said that if a writing has been destroyed by the party wishing to prove its contents no secondary evidence will be received, unless the party can show that the destruction was not for the purpose of suppressing evidence or any fraudulent purpose.³ No English cases, however, are cited which support so severe a rule. On the contrary, the English courts have held that not only in the case of alteration by a stranger may the altered deed be given in evidence as proof that a title passed,⁴ but that this may be done even where the alteration was chargeable to the party offering the deed,⁵ and similarly that the cancellation of a conveyance does not prevent proof by one consenting to the cancellation that such a convey-

¹ See 1 Greenleaf, Ev. § 563 *b.*; Leake, Cont. (4th ed.) 580. In the case of a negotiable instrument the aid of a court of equity remained necessary, for the plaintiff in such a case could not fairly be given relief except upon the terms of giving a bond to indemnify the defendant from possible subsequent liability on the instrument if it were found. See 2 Ames Cas. B. & N. 38, 42 *n.* But this was not applied to non-negotiable instruments. *Wain v. Bailey*, 10 A. & E. 616. And in the case of negotiable instruments, reformed procedure or statutes have made resort to equity unnecessary in many jurisdictions. 2 Ames Cas. B. & N. 19 *n.*

² Sel. C. Chanc. temp. King 24. In *Arrison v. Harmstead*, 2 Barr 191 193, counsel argued that equity would reform an altered deed in favor of a purchaser, but Gibson, C. J., interrupted, "The deed is dead and equity cannot put life into it." This was cited with approval in *Wallace v. Harmstead*, 44 Pa. 492, 494. See also *Marcy v. Dunlap*, 5 Lans. 365.

³ 1 Greenleaf, Ev. (16th ed.) § 563 *b.*, citing numerous decisions.

⁴ *Doe v. Hirst*, 3 Stark. 60; *Hutchins v. Scott*, 2 M. & W. 809; *West v. Steward*, 14 M. & W. 47; see also *Woods v. Hilderbrand*, 46 Mo. 284; *Jackson v. Gould*, 7 Wend. 364.

⁵ *Agricultural Ins. Co. v. Fitzgerald*, 16 Q. B. 432.

ance was made.¹ The Supreme Court of Alabama has followed the English decisions.²

In this country alteration by a stranger does not generally avoid a deed, so that such a deed can of course be given in evidence, but it has been held generally, in accordance with the rule of evidence stated above, that if a material alteration is fraudulently made the altered deed cannot thereafter be given in evidence.³ Whether this in effect transfers the title back to the grantor depends on whether the rule is aimed solely against the party guilty of the fraudulent alteration and his heirs or donees, or whether even a *bona fide* purchaser from him would acquire no better title. It may be urged that if a purchaser is protected the fraudulent person is in effect given the benefit of his title by being allowed to sell it, though he cannot directly enforce it. Accordingly the Pennsylvania Supreme Court has held that a *bona fide* purchaser can no more assert a title than his wrongdoing grantor.⁴ This conclusion is supported by the rule in regard to executory contracts avoided by alteration. Even though the contract is negotiable an innocent purchaser acquires no rights.⁵

The rights of creditors are also frequently involved. If the owner of property is so deeply indebted that he could not legally make a voluntary conveyance of it, he cannot be allowed to produce the same effect by destroying the evidence of his title by alteration or cancellation of the conveyance. His creditors may levy on the property. If, however, the debtor cancelled a deed for adequate consideration, or if he had other property sufficient

¹ Ward v. Lumley, 5 H. & N. 656. See also s. c. 5 H. & N. 87; Harris v. Owen, West Ch. 527, s. c. *sub nom.* Harrison v. Owen, 1 Atk. 520.

² Alabama Land Co. v. Thompson, 104 Ala. 570; Burgess v. Blake, 128 Ala. 105; Harper v. Reaves, 132 Ala. 625. See also Woods v. Hilderbrand, 46 Mo. 284; Holladay-Klotz Co. v. T. J. Moss Co., 89 Mo. App. 556.

³ Chesley v. Frost, 1 N. H. 145; Babb v. Clemson, 10 S. & R. 419; Withers v. Atkinson, 1 Watts 236; Bliss v. McIntyre, 18 Vt. 466; Newell v. Mayberry, 3 Leigh 250; Batchelder v. White, 80 Va. 103.

So of a written contract. Hayes v. Wagner, 89 Ill. App. 390.

The numerous decisions holding that a writing with an apparent alteration cannot be received in evidence unless the alteration is explained necessarily involve the same point. Decisions which allow such documents to be received in evidence on proof of the signature, leaving the question of alteration to be decided as an issue in the case, have a contrary implication. These decisions will be referred to in the January number of the REVIEW.

⁴ Arrison v. Harmstead, 2 Barr 191, 197; Wallace v. Harmstad, 15 Pa. 462; Wallace v. Harmstad, 44 Pa. 492. See also Marr v. Hobson, 22 Me. 321. But see Chesley v. Frost, 1 N. H. 145.

⁵ The decisions will be collected in the January number of the REVIEW.

to satisfy his debts, the creditors should have no greater rights than their debtor had, except so far as recording acts or other statutes may provide.¹

The voluntary destruction or cancellation by the grantee of a conveyance is not ordinarily done for any fraudulent purpose, but it is an intentional destruction of the appropriate evidence of his title, and it would seem that a court might as well decline to allow a grantee who has done this for the very purpose of depriving himself of his rights to prove his title by secondary evidence, as to deny that privilege to one who has been guilty of some fraudulent purpose. Many cases accordingly hold that neither the grantee nor any one claiming under him can assert his title after such cancellation.² These decisions have not met uniform approval in this country,³ but there are not many cases to the contrary. Cases are not in point where primary evidence of the destroyed deed was obtainable, or where the party seeking to use secondary evidence was not bound by the default or estoppel binding the original grantee. Thus the doctrine is applicable only to unrecorded deeds,⁴ for when a deed has been recorded and subsequently fraudulently altered or destroyed, there is no difficulty of proof if the statute makes a copy from the records primary evidence. If, however, a deed is altered before it is recorded, the record can afford no help.⁵ If a writing is not necessary to the transfer of property, as is the case with chattel property, altera-

¹ See *Steeley's Creditors v. Steeley*, 23 Ky. L. Rep. 996.

² *Thompson v. Thompson*, 9 Ind. 323; *Patterson v. Yeaton*, 47 Me. 308, 314; *Trull v. Skinner*, 17 Pick. 213, 215; *Howe v. Wilder*, 11 Gray 267 (but see *Chessman v. Whittemore*, 23 Pick. 231); *McAllister v. Mitchner*, 68 Miss. 672, 679; *Potter v. Adams*, 125 Mo. 118; *Farrar v. Farrar*, 4 N. H. 191; *Bank v. Eastman*, 44 N. H. 431; *Sawyer v. Peters*, 50 N. H. 143; *Dukes v. Spangler*, 35 Ohio St. 119 (see *Spangler v. Dukes*, 39 Ohio St. 642); *Wiley v. Christ*, 4 Watts 196, 199; *Howard v. Huffman*, 3 Head 562; *Bliss v. McIntyre*, 18 Vt. 466 (lease); *Parker v. Kane*, 4 Wis. 1, 22 How. 1 (but see *Rogers v. Rogers*, 53 Wis. 36; *Slaughter v. Bernards*, 97 Wis. 184, 190).

So where the name of the grantee in a deed was changed with the concurrence of the grantee first named, it was held he could not afterwards claim title in himself. *Abbott v. Abbott*, 189 Ill. 488.

³ *Cunningham v. Williams*, 42 Ark. 170; *Diver v. Friedheim*, 43 Ark. 203; *Cranmer v. Porter*, 41 Cal. 462; *Weygant v. Bartlett*, 102 Cal. 224; *Botsford v. Morehouse*, 4 Conn. 550; *Gilbert v. Bulkley*, 5 Conn. 262; *Ferguson v. Bond*, 39 W. Va. 561. See further 2 Devlin on Deeds § 300 *et seq.*; 2 Jones on Real Property § 1258.

⁴ See cases cited in note 2, *supra*; *Wheeler v. Single*, 62 Wis. 380. See also *Van Riswick v. Goodhue*, 50 Md. 57.

⁵ *Marr v. Hobson*, 22 Me. 321. See also *Moelle v. Sherwood*, 148 U. S. 21; *Respass v. Jones*, 102 N. C. 5. Cf. *Chessman v. Whittemore*, 23 Pick. 231.

tion of a bill of sale or other writing conveying such property will not prevent proof of the transfer.¹

A deed to which there are several parties will not be avoided as to one party by the alteration of a provision which relates wholly to other parties.² Also a deed may operate both as a conveyance and as an obligation. Indeed most conveyances contain covenants. In such a case a material wrongful alteration will discharge the obligation, though it may not divest the title conveyed,³ except in so far as the grantee's lack of legal evidence to prove his title by record or otherwise may in effect revest the grantor with the property. Accordingly, when a mortgage is materially and wrongfully altered by the mortgagee, any executory right which the mortgage deed gives is thereby discharged,⁴ as for instance a right to enter on the mortgagor's premises and take mortgaged chattels.⁵ But the mortgaged estate is still in the mortgagee, where the common law theory of the effect of a mortgage prevails.⁶ Where

¹ *Ransier v. Vanorsdol*, 50 Ia. 130; *Babb v. Clemson*, 10 S. & R. 419.

² *Doe v. Bingham*, 4 B. & Ald. 672; *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432, 440; *Robinson v. Phoenix Ins. Co.*, 25 Ia. 430; *Shelton v. Deering*, 10 B. Mon. 405; *Bird v. Bird*, 40 Me. 394; *Kendall v. Kendall*, 12 Allen 92; *Herrick v. Baldwin*, 17 Minn. 209; *Holladay-Klotz Co. v. T. J. Moss Co.*, 89 Mo. App. 556; *Wright v. Kelley*, 4 Lans. 57, 63; *Arrison v. Harmstead*, 2 Barr 191, 194. But see *Pigot's Case*, 11 Coke 26 b.

In *Woods v. Hilderbrand*, 46 Mo. 284, and *Burnett v. McCluey*, 78 Mo. 676, it was held that an alteration in the description of one tract in a deed, whatever its effect on the conveyance of this tract, would not affect the validity of the deed as to another tract. But see *Powell v. Pearlstine*, 43 S. C. 403; *Bowser v. Cole*, 74 Tex. 222, where it was held that the insertion of an additional tract avoided a mortgage as to the tract originally included.

And similarly the addition in a mortgage of other notes than that which it was actually given to secure avoids the mortgage as to all the notes. *Johnson v. Moore*, 33 Kan. 90; *Russell v. Reed*, 36 Minn. 376.

In *Parke Co. v. White River Lumber Co.*, 110 Cal. 658, it was held that alteration of a contract secured by a mortgage discharged the mortgage as far as the contract was concerned, but not so far as a separate note also secured by the same mortgage was concerned.

³ *Ward v. Lumley*, 5 H. & N. 87, 656; *Withers v. Atkinson*, 1 Watts 236; *Arrison v. Harmstead*, 2 Barr 191, 194; *North v. Henneberry*, 44 Wis. 306.

⁴ *Harris v. Owen*, West Ch. 527, s. c. *sub nom.* *Harrison v. Owen*, 1 Atk. 520; *Cutler v. Rose*, 35 Ia. 456; *Hollingsworth v. Holbrook*, 80 Ia. 151; *Johnson v. Moore*, 33 Kan. 90; *Coles v. Yorks*, 28 Minn. 464; *Pereau v. Frederick*, 17 Neb. 117; *Kime v. Jesse*, 52 Neb. 606; *Waring v. Smyth*, 2 Barb. Ch. 119; *Marcy v. Dunlap*, 5 Lans. 365; *McIntyre v. Velte*, 153 Pa. 350; *Powell v. Pearlstine*, 43 S. C. 403, 409.

⁵ *Hollingsworth v. Holbrook*, 80 Ia. 151; *Bacon v. Hooker*, 177 Mass. 335.

⁶ *Harris v. Owen*, West Ch. 527, s. c. *sub nom.* *Harrison v. Owen*, 1 Atk. 520; *Kendall v. Kendall*, 12 Allen 92 (see also *Bacon v. Hooker*, 177 Mass. 335); *Cheek v. Nall*, 112 N. C. 370; *Heath v. Blake*, 28 S. C. 406. See also *Williams v. Van Tuyl*, 2 Ohio St. 336.

a mortgage is held to give the mortgagee only a lien, however, such alteration discharges the lien.¹ Alteration of the mortgage in such a way as to invalidate it does not, however, discharge a note given with the mortgage for the mortgage debt.² When alteration of the note will not only avoid the note, but altogether discharge the debt, will be discussed hereafter.³

Kinds of Contract to which the Rule is Applicable.

The rule denying recovery where a writing has been altered might, so far as relates to the fundamental reason of the rule, have been confined to specialties, which by our law are more than mere evidence of obligations,⁴ but this reason was early obscured, and the rule was largely rested on principles of evidence and policy that were equally applicable to any written contract. It is true that the rule was first extended from deeds to bills of exchange,⁵ which are in truth mercantile specialties,⁶ being themselves obligations, not merely evidence; and the same may perhaps be said of policies of insurance⁷ to which the rule was soon extended,⁸ but the grounds on which these extensions were actually made were those of lack of legal evidence and requirements of policy.

It is not surprising therefore to find in this century the rule

¹ *Johnson v. Moore*, 33 Kan. 90; *Russell v. Reed*, 36 Minn. 376; *Powell v. Banks*, 146 Mo. 620; *Kime v. Jesse*, 52 Neb. 606; *Waring v. Smyth*, 2 Barb. Ch. 119; *McIntyre v. Velte*, 153 Pa. 350.

² *Kime v. Jesse*, 52 Neb. 606. See also *Powell v. Pearlstine*, 43 S. C. 403.

³ In the January number of the REVIEW.

⁴ "The alteration was a cancellation of the deed, having the same effect that tearing off the seals would have had. This rule comes down to us from a time when the contract contained in a sealed instrument was bound so indissolubly to the substance of the document that the soul perished with the body when the latter was destroyed or lost its identity for any cause." *Per* Holmes, C. J., in *Bacon v. Hooker*, 177 Mass. 335, 337.

"Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions." *Per* Holmes, J., in *Blackstone v. Miller*, 188 U. S. 189, 206.

⁵ *Master v. Miller*, 4 T. R. 320, 2 H. Bl. 141.

The doctrine has been more frequently applied to bills and notes than to any other instruments. See numerous cases collected in 1 Ames Cas. B. & N. 447-449; *Daniel*, Neg. Inst.

⁶ See 2 Ames Cas. B. & N. 872; *Langdell*, Summ. Cont. § 49 *et seq.*

⁷ *Ibid.*

⁸ *Campbell v. Christie*, 2 Stark. 64; *Forshaw v. Chabert*, 3 Brod. & B. 158.

against alteration applied not only to all written contracts,¹ but even to writings like memoranda to satisfy the Statute of Frauds,² which are written evidence, but cannot properly be regarded as written contracts.

Excusable Alteration.

The original reason for the rule against alteration was obviously applicable as well when the alteration was made by a stranger, or when it was made by the obligee without fraudulent intent to correct a real or supposed mistake, as when made by the obligee with fraudulent purpose; but after relief was given by equity and by the allowance of secondary evidence in cases of accidental loss or destruction, it would seem as if similar relief should have been given in case of alteration, where the obligee was innocent of any fraudulent intent, certainly where he had no part whatever in the alteration. But the English law did not take this step. Alteration by a stranger still operates as a discharge of a contract, provided the instrument was at the time in the custody of the obligee, for it is said that "a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state."³ Why he should be bound to more care to prevent alteration by a stranger than to prevent the total loss or destruction of the instrument, is difficult to see. An alteration made under a mistake of fact has been held not fatal;⁴ but otherwise if the alteration was intentionally made and the mistake was only as to the legal effect of the

¹ *Powell v. Divett*, 15 East 29; *Forshaw v. Chabert*, 3 Brod. & B. 158; *United States Glass Co. v. West Va. Bottle Co.*, 81 Fed. Rep. 993; *Baxter v. Camp*, 71 Conn. 245; *Johnson v. Brown*, 51 Ga. 498; *Kline v. Raymond*, 70 Ind. 271; *Andrews v. Burdick*, 62 Iowa 714, 720; *Davis v. Campbell*, 93 Iowa 524; *Lee v. Alexander*, 9 B. Mon. 25; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97; *Osgood v. Stevenson*, 143 Mass. 399; *Fletcher v. Minneapolis Ins. Co.*, 80 Minn. 152; *Burton v. American Ins. Co.*, 88 Mo. App. 392; *Consaul v. Sheldon*, 35 Neb. 247; *Meyer v. Huneke*, 55 N. Y. 412; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498; *Cline v. Goodale*, 23 Oreg. 406; *American Pub. Co. v. Fisher*, 10 Utah 147; *Consumers' Ice Co. v. Jennings*, 100 Va. 719; *Schwalm v. McIntyre*, 17 Wis. 232.

² *Nichols v. Johnson*, 10 Conn. 192; *A. A. Cooper Wagon Co. v. Wooldridge*, 98 Mo. App. 648; *Schmidt v. Quinzel*, 55 N. J. Eq. 792. So where several writings are essential to prove the agreement of the parties, fraudulent alteration of one invalidates all. *Meyer v. Huneke*, 55 N. Y. 412.

³ *Davidson v. Cooper*, 13 M. & W. 343, 352.

⁴ *Raper v. Birkbeck*, 15 East 17; *Wilkinson v. Johnson*, 3 B. & C. 428; *Prince v. Oriental Bank*, 3 App. Cas. 325. These were cases where the cancellation under a mistake of fact of the name of a party to an obligation was held not to discharge the party.

contract.¹ In this country the more equitable rule prevails that alteration by a stranger or spoliation, as it is often called, will not discharge the obligation.² The rule is the same for alteration by the obligee's agent or attorney if the obligee himself did not authorize it;³ or by a trustee.⁴ So far as negotiable instruments are concerned, however, a reversion to the English doctrine in regard to alteration by a stranger has been brought about in states which have enacted the Negotiable Instruments Law. The draftsman of that law copied the section on the subject from the English Bills of Exchange Act.⁵

¹ *Bank of Hindustan v. Smith*, 36 L. J. (N. S.) C. P. 241. The distinction between this case and those in the preceding note seems trivial. The court may well have been influenced by the fact that there were in this case equitable grounds for holding the defendant not liable, aside from any question of alteration.

² *United States v. Hatch*, 1 Paine 336; *Davis v. Carlisle*, 6 Ala. 707; *Nichols v. Johnson*, 10 Conn. 192; *Orlando v. Gooding*, 34 Fla. 244; *Condict v. Flower*, 106 Ill. 105; *Paterson v. Higgins*, 58 Ill. App. 268; *State v. Berg*, 50 Ind. 496; *Eckert v. Louis*, 84 Ind. 99; *Lee v. Alexander*, 9 B. Mon. 25; *Blakey v. Johnson*, 13 Bush 197; *Chessman v. Whittemore*, 23 Pick. 231; *Drum v. Drum*, 133 Mass. 566; *Church v. Fowle*, 142 Mass. 12; *Croft v. White*, 36 Miss. 455; *Medlin v. Platte Co.*, 8 Mo. 235; *Moore v. Ivers*, 83 Mo. 29; *Fisherdict v. Hutton*, 44 Neb. 122, 127; *Perkins Windmill Co. v. Tillman*, 55 Neb. 652; *Schlageck v. Widhalm*, 59 Neb. 541; *Goodfellow v. Inslee*, 1 Beas. 355; *Rees v. Overbaugh*, 6 Cow. 746; *Lewis v. Payn*, 8 Cow. 71; *Dinsmore v. Duncan*, 57 N. Y. 573; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498; *Evans v. Williamson*, 79 N. C. 86; *Whitlock v. Manciet*, 10 Oreg. 166; *Neff v. Horner*, 63 Pa. 327; *Robertson v. Hay*, 91 Pa. 242; *Pope v. Chafee*, 14 Rich. Eq. 69; *Harrison v. Turbeville*, 2 Humph. 242; *Boyd v. McConnell*, 10 Humph. 68; *Murray v. Peterson*, 6 Wash. 418; *Union Nat. Bank v. Roberts*, 45 Wis. 373. See also cases cited in the following note. So in Ireland, *Swiney v. Barry*, 1 Jones 109. *Contra*, *Den v. Wright*, 2 Halst. 175, 177.

³ *Forbes v. Taylor*, 35 So. Rep. 855 (Ala.); *Langenberger v. Kroeger*, 48 Cal. 147; *Brooks v. Allen*, 62 Ind. 401; *Mathias v. Leathers*, 99 Ia. 18, 21; *Nickerson v. Swett*, 135 Mass. 514; *White Co. v. Dakin*, 86 Mich. 581; *Christian County Bank v. Goode*, 44 Mo. App. 129; *Hays v. Odom*, 79 Mo. App. 425; *Hunt v. Gray*, 35 N. J. L. 227; *Rees v. Overbaugh*, 6 Cow. 746; *Casoni v. Jerome*, 58 N. Y. 321; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498; *Gleason v. Hamilton*, 64 Hun 96, 138 N. Y. 353; *Waldorf v. Simpson*, 15 N. Y. App. Div. 297; *Fullerton v. Sturgis*, 4 Ohio St. 529; *Acme Harvester Co. v. Butterfield*, 12 S. Dak. 91; *Port Huron Co. v. Sherman*, 14 S. Dak. 461; *Deering Harvester Co. v. White*, 72 S. W. Rep. 962 (Tenn.); *Bigelow v. Stilphen*, 35 Vt. 521; *Yeager v. Musgrave*, 28 W. Va. 90; *Jesup v. City Bank*, 14 Wis. 331. But see *contra*, *White Sewing Machine Co. v. Saxon*, 121 Ala. 399; *Hollingsworth v. Holbrook*, 80 Ia. 151 (*cf.* *Mathias v. Leathers*, 99 Ia. 18); *Gettysburg Nat. Bank v. Chisholm*, 169 Pa. 564. See also *Pew v. Laughlin*, 3 Fed. Rep. 39; *Bowser v. Cole*, 74 Tex. 222. If the principal seeks to take the benefit of the agent's alteration, the effect is the same as if the principal had himself made the alteration. *Nichols v. Rosenfeld*, 181 Mass. 525; *Sherwood v. Merritt*, 83 Wis. 232.

⁴ *Flinn v. Brown*, 6 Rich. L. 209. But see *contra*, as to an administrator, *McMurtrey v. Sparks*, 71 Mo. 126.

⁵ Neg. Inst. Act, § 205, following Bills of Exch. Act, § 64. See 16 HARV. L. REV. 260; *Hoffman v. Planters' Bank*, 99 Va. 480. But see *Jeffrey v. Rosenfeld*, 179 Mass. 506.

An unauthorized alteration by the obligor is, of course, not allowed to affect the rights of the obligee.¹

The propriety of relieving a party who has altered a written contract by allowing secondary evidence of the contract depends on his freedom from fraudulent or wrongful intent in making the alteration. Therefore, if the alteration was made to express more clearly the intent of the parties or to correct a real or supposed mistake, the contract is in this country generally held not avoided.² Similarly, a cancellation by mistake is not fatal.³

As to alterations authorized by the obligor, the common law made a distinction between an alteration affecting a sealed contract and one affecting other writings. As the common law required that the authority of an agent to execute a sealed instrument should be itself under seal,⁴ parol authorization could not make the deed in its altered form the deed of the obligor.⁵ Nor

¹ *Cutts v. United States*, 1 Gall. 69; *United States v. Spalding*, 2 Mason 478; *Lane v. Pacific, etc., Ry. Co.*, 67 Pac. Rep. 656 (Idaho); *Osborn v. Andrees*, 37 Kan. 301; *Hughes v. Littlefield*, 18 Me. 400; *Natchez v. Minor*, 17 Miss. 544; *Fritz v. Commissioners*, 17 Pa. 130.

² *Brutt v. Picard, Ryan & M.* 37; *Winnipisiogee Paper Co. v. New Hampshire Land Co.*, 59 Fed. Rep. 542; *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Webb v. Mullins*, 78 Ala. 111; *Turner v. Billagram*, 2 Cal. 520; *Sill v. Reese*, 47 Cal. 294; *Sullivan v. California Realty Co.*, 75 Pac. Rep. 767 (Cal.); *Hotel Lanier Co. v. Johnson*, 103 Ga. 604; *Burch v. Pope*, 114 Ga. 334; *Miller v. Slade*, 116 Ga. 772; *Shirley v. Swafford*, 45 S. E. Rep. 722 (Ga.); *Day v. Fort Scott Co.*, 53 Ill. App. 165; *Osborn v. Hall*, 160 Ind. 153; *Busjahn v. McLean*, 3 Ind. App. 281; *Andrews v. Burdick*, 62 Ia. 714; *Barlow v. Buckingham*, 68 Ia. 169; *Duker v. Franz*, 7 Bush 273; *Thornton v. Appleton*, 29 Me. 298; *Croswell v. Labree*, 81 Me. 44; *Outoun v. Dulin*, 72 Md. 536; *Ames v. Colburn*, 11 Gray 390; *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577; *James v. Tilton*, 183 Mass. 275; *McRaven v. Crisler*, 53 Miss. 542; *Foote v. Hambrick*, 70 Miss. 157; *Cole v. Hills*, 44 N. H. 227; *Seymour v. Mickey*, 15 Ohio St. 515; *Wallace v. Jewell*, 21 Ohio St. 163; *Cline v. Goodale*, 23 Oreg. 406; *Wallace v. Tice*, 32 Oreg. 283 (*cf. Savage v. Savage*, 36 Oreg. 268); *Express Pub. Co. v. Aldine Press*, 126 Pa. 347; *Gunter v. Addy*, 58 S. C. 178; *McClure v. Little*, 15 Utah 379; *Wolferman v. Bell*, 6 Wash. 84; *Young v. Wright*, 4 Wis. 144; *Gordon v. Robertson*, 48 Wis. 493. But see *contra*, *Warpole v. Ellison*, 4 Houst. 322; *Kelly v. Trumble*, 74 Ill. 428; *Soaps v. Eichberg*, 42 Ill. App. 375, 381; *Hamilton v. Wood*, 70 Ind. 306; *Letcher v. Bates*, 6 J. J. Marsh. 524; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 103; *Evans v. Foreman*, 60 Mo. 449; *Bowers v. Jewell*, 2 N. H. 543; *Lewis v. Schenck*, 3 C. E. Green 459; *Wegner v. State*, 28 Tex. App. 419; and see also *Green v. Sneed*, 101 Ala. 205; *White Sewing Machine Co. v. Saxon*, 121 Ala. 399; *Heath v. Blake*, 28 S. C. 406; *Capital Bank v. Armstrong*, 62 Mo. 59; *Otto v. Half*, 89 Tex. 384.

³ *Lowremore v. Berry*, 19 Ala. 130; *Brett v. Marston*, 45 Me. 401; *Russell v. Longmoor*, 29 Neb. 209. See also *Chamberlin v. White*, 79 Ill. 549.

⁴ *Mechem on Agency*, § 93.

⁵ *Hibblewhite v. McMorine*, 6 M. & W. 200; *United States v. Nelson*, 2 Brock. 64; *Cross v. State Bank*, 5 Ark. 525; *Upton v. Archer*, 41 Cal. 85; *People v. Organ*, 27 Ill. 27; *Simms v. Hervey*, 19 Ia. 273; *Ayres v. Probasco*, 14 Kan. 175; *Burns v.*

could the deed be valid according to its original terms for the deed in that form was destroyed by the mere fact that it possessed no longer physical identity with the original obligation.¹ It is plain, however, that if this be granted the obligee should be relieved from the consequences of such a destruction of the obligation, and in modern times wherever the instrument is unenforceable at law in its altered form, secondary evidence would be allowed to prove the original terms of the obligation, and if valid in that form it would be enforced,² or if the Statute of Frauds did not prevent, equity should reform the deed to conform to the agreement of parties or should treat it as if reformed.³

Similar reasoning is applicable if the law requires a contract of the kind which has been altered to be in writing signed by the promisor.⁴

If the writing was unsealed, an authorized alteration is binding upon both parties, and the altered form of the contract, not the original form, will be enforced.⁵ In jurisdictions where the peculiar doctrines applicable to sealed contracts are no longer in force,

Lynde, 6 Allen 305; Basford v. Pearson, 9 Allen 387; Lindsley v. Lamb, 34 Mich. 509; Williams v. Crutcher, 6 Miss. 71; Blacknall v. Parish, 6 Jones Eq. 70; Graham v. Holt, 3 Ired. 300; Barden v. Southerland, 70 N. C. 528; Martin v. Buffalo, 121 N. C. 34, 36; Gilbert v. Anthony, 1 Yerg. 69; Mosby v. State, 4 Sneed 324; Walla Walla Co. v. Ping, 1 Wash. T. 339.

If the alteration is made before delivery by an agent of the grantor authorized to deliver, the grantor is held bound by the alteration, if not broadly on the ground that parol authority is good, then on principles of estoppel. Allen v. Withrow, 110 U. S. 119; Swartz v. Ballou, 47 Ia. 188; State v. Tripp, 113 Ia. 698, 704; Dolbeer v. Livingston, 100 Cal. 617; Phelps v. Sullivan, 140 Mass. 36; Field v. Stagg, 52 Mo. 534; Thummel v. Holden, 149 Mo. 677, 684; Cribben v. Deal, 21 Oreg. 211; Van Etta v. Evenson, 28 Wis. 33. Cf. Vaca Valley R. R. v. Mansfield, 84 Cal. 560. If a new delivery of the deed is made after the alteration, the deed is, of course, binding in its altered form. De Malarin v. United States, 1 Wall. 282; Prettyman v. Goodrich, 23 Ill. 330; but held otherwise if the new delivery was made without knowledge of the alterations. Nesbitt v. Turner, 155 Pa. 429.

¹ In *McNab v. Young*, 81 Ill. 11, it was held that the objection that an authorized insertion was made after execution could not be taken by one not claiming in the right of the grantor.

² *Gunter v. Addy*, 58 S. C. 178.

³ *Burnside v. Wayman*, 49 Mo. 356; *McQuie v. Peay*, 58 Mo. 56; *Bryant v. Bank*, 107 Tenn. 560. See also *Mohlis v. Trauffer*, 91 Ia. 751.

⁴ *Upton v. Archer*, 41 Cal. 85; *Ingram v. Little*, 14 Ga. 173 (overruled by *Brown v. Colquitt*, 73 Ga. 59; *Smith v. Farmers' Mut. Ins. Assoc.*, 111 Ga. 737). But see *Bluck v. Gompertz*, 7 Ex. 862; *Winslow v. Jones*, 88 Ala. 496.

⁵ *Gardiner v. Harback*, 21 Ill. 129; *Grimsted v. Briggs*, 4 Ia. 559; *Stewart v. First Nat. Bank*, 40 Mich. 348; *Wilson v. Henderson*, 17 Miss. 375; *Humphreys v. Guillow*, 13 N. H. 385; *Taddiken v. Cantrell*, 69 N. Y. 597; *Schmelz v. Rix*, 95 Va. 509. See also cases in the following notes.

the same result is necessarily reached as to such contracts,¹ and even in other states, for practical reasons, the same result is often reached.² Ratification, subsequent to the alteration, has as full effect as authority originally granted;³ and ratification may be shown by any conduct from which assent can fairly be implied.⁴

Indeed ratification may be more effectual in the case of a sealed instrument than prior authority could have been. A sealed instrument takes its validity from delivery, and the maker may adopt a signature or seal previously made and make them his own by delivering them as his. A redelivery therefore of a sealed instrument by the obligor after it has been altered will make it binding in its altered form. A prior consent to an alteration can hardly amount to a redelivery after the alteration, but if the maker himself assists or takes part in the alteration it would generally be easy to find a new delivery, and courts which, like those of

¹ *Dolbeer v. Livingston*, 100 Cal. 617; *Gardiner v. Harback*, 21 Ill. 129; *Swartz v. Ballou*, 47 Ia. 188; *State v. Tripp*, 113 Ia. 698, 704.

² *Speake v. United States*, 9 Cranch 28; *Drury v. Foster*, 2 Wall. 24, 33; *Woodbury v. Allegheny, etc., Co.*, 72 Fed. Rep. 371; *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 274; *Inhabitants v. Huntress*, 53 Me. 89; *State v. Young*, 23 Minn. 551; *Field v. Stagg*, 52 Mo. 534; *Otis v. Browning*, 59 Mo. App. 326; *Cribben v. Deal*, 21 Oreg. 211; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64; *Bank v. Hammond*, 1 Rich. L. 281; *Lamar v. Simpson*, 1 Rich. Eq. 71; *Schintz v. McManamy*, 33 Wis. 301.

³ *Speake v. United States*, 9 Cranch 28; *Goodspeed v. Cutler*, 75 Ill. 534; *Scott v. Bibb*, 48 Ill. App. 657; *Emerson v. Opp*, 9 Ind. App. 581; *Pelton v. Prescott*, 13 Ia. 567; *Browning v. Gosnell*, 91 Ia. 448; *Fletcher v. Minneapolis Ins. Co.*, 80 Minn. 152; *Workman v. Campbell*, 57 Mo. 53; *Humphreys v. Guillow*, 13 N. H. 385; *Conable v. Smith*, 61 Hun 185; *Wester v. Bailey*, 118 N. C. 193; *Matlock v. Wheeler*, 29 Oreg. 64; *Jacobs v. Gilreath*, 45 S. C. 46; *Ratcliff v. Planters' Bank*, 2 Sneed 425; *Chezum v. McBride*, 21 Wash. 558. But held otherwise as to a surety. *Mulkey v. Long*, 5 Idaho 213; *Warren v. Fant*, 79 Ky. 1 (*contra*, *Bell v. Mahin*, 69 Ia. 408. See also *Knoebel v. Kincher*, 33 Ill. 308). Where the original alteration amounted to a forgery, it was held that ratification was not possible. *Wilson v. Hayes*, 40 Minn. 531 (*contra*, *Marks v. Schram*, 109 Wis. 452. See also *Ofenstein v. Bryan*, 20 App. D. C. 1).

⁴ *Barnsdall v. Boley*, 119 Fed. Rep. 191; *Montgomery v. Crossthwait*, 90 Ala. 553; *Dickson v. Bamberger*, 107 Ala. 293; *Payne v. Long*, 121 Ala. 385, 131 Ala. 438; *Jackson v. Johnson*, 67 Ga. 167; *Yocum v. Smith*, 63 Ill. 321; *Oswego v. Kellogg*, 99 Ill. 590; *Linington v. Strong*, 107 Ill. 295; *Canon v. Grisby*, 116 Ill. 151; *Bell v. Mahin*, 69 Ia. 408; *Dover v. Robinson*, 64 Me. 183; *Ward v. Allen*, 2 Met. 53; *Prouty v. Wilson*, 123 Mass. 297; *Stewart v. First Nat. Bank*, 40 Mich. 348; *Janney v. Goehringer*, 52 Minn. 428; *Board v. Gray*, 61 Minn. 242; *Evans v. Foreman*, 60 Mo. 449; *Reed v. Morton*, 24 Neb. 760; *Perkins Windmill Co. v. Tillman*, 55 Neb. 652; *Wright v. Buck*, 62 N. H. 656; *Conable v. Keeney*, 61 Hun 624; *Jacobs v. Gilreath*, 45 S. C. 46. *Cf.* *State v. Churchill*, 48 Ark. 426; *Benedict v. Miner*, 58 Ill. 19; *Fraker v. Cullum*, 21 Kan. 555; *Fraker v. Little*, 24 Kan. 598; *German Bank v. Dunn*, 62 Mo. 79; *Kennedy v. Lancaster Bank*, 18 Pa. 347; *McDaniel v. Whitsett*, 96 Tenn. 10.

England, hold that there is always a delivery when the maker of a deed indicates his assent to be bound by it as a completed instrument have no difficulty in finding delivery when the maker after an alteration has been made ratifies it.¹ But if acknowledgment² or witnesses³ are necessary to the validity of the deed, the assent of the parties, even though amounting to a redelivery, would be insufficient to make the alterations part of the deed.

If there are several obligors bound by an obligation, a material alteration of the obligation made with the assent of one or more parties will be binding upon those who assent,⁴ but will totally avoid the obligation of any who do not assent.⁵

¹ *Hudson v. Revett*, 4 Bing. 368; *Winslow v. Jones*, 88 Ala. 496; *Stiles v. Probst*, 69 Ill. 382; *Abbott v. Abbott*, 189 Ill. 488, 497; *Bassett v. Bassett*, 55 Me. 127; *Vidvard v. Cushman*, 35 Hun 18; *Wester v. Bailey*, 118 N. C. 193.

² *Booker v. Stivender*, 13 Rich. L. 85.

³ *Drury v. Foster*, 2 Wall. 24; *Bryant v. Bank*, 107 Tenn. 560, 567. See also *Keene Mach. Co. v. Barratt*, 100 Fed. Rep. 590 (C. C. A.). But the deed may be good as between the parties. *Walkley v. Clarke*, 107 Ia. 451; *Bryant v. Bank*, 107 Tenn. 560.

⁴ *Hochmark v. Richler*, 16 Col. 263; *Browning v. Gosnell*, 91 Ia. 448; *Rhoades v. Leach*, 93 Ia. 337; *Brownell v. Winnie*, 29 N. Y. 400, 409.

⁵ *Gardner v. Walsh*, 5 E. & B. 83; *Martin v. Thomas*, 24 How. 315; *Mundy v. Stevens*, 61 Fed. Rep. 77; *State v. Churchill*, 48 Ark. 426; *State v. Smith*, 9 Houst. 143; *Gardiner v. Harback*, 21 Ill. 129; *State v. Van Pelt*, 1 Ind. 304; *Zimmerman v. Judah*, 13 Ind. 286, 22 Ind. 388; *Horn v. Newton Bank*, 32 Kan. 518; *Warring v. Williams*, 8 Pick. 322; *Greenfield Bank v. Stowell*, 123 Mass. 196; *Board v. Gray*, 61 Minn. 242; *Love v. Shoape*, 1 Miss. 508; *Morrison v. Garth*, 78 Mo. 434; *State v. Findley*, 101 Mo. 368; *McMillan v. Hefferlin*, 18 Mont. 385; *Davis v. Bauer*, 41 Ohio St. 257; *Wills v. Wilson*, 3 Oreg. 308; *Rittenhouse v. Levering*, 6 Watts & S. 190; *Broughton v. Fuller*, 9 Vt. 373; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392.

See also *Reese v. United States*, 9 Wall. 13; *United States v. Freel*, 186 U. S. 309; *People v. Kneeland*, 31 Cal. 288; *Cotten v. Williams*, 1 Fla. 42; *Thompson v. Williams*, 1 Fla. 64; *Ames Cas. Suretyship* 246 n.

The court will not restore such an obligation to its original form, so as to make sureties liable again on the obligation which they assumed. *Ruby v. Talbott*, 5 N. Mex. 251; *Fulmer v. Seitz*, 68 Pa. 237. Cf. *Davis v. Shafer*, 50 Fed. Rep. 764; *Nickerson v. Swett*, 135 Mass. 514.

Of course, if there are entirely distinct obligations created by the same instrument, an alteration of one obligation only does not invalidate the others. But the fact that an obligation is several at law is not conclusive. *Collins v. Prosser*, 1 B. & C. 682, which held that tearing off the seal of one obligor on a several bond thereby discharging him did not destroy the obligors, is clearly erroneous. The court admit that the right of contribution in equity was affected, and this is surely material.

In *Brownell v. Winnie*, 29 N. Y. 400, the name of an obligor was added as maker to a note, and the court, in holding the alteration immaterial, relied on the fact that the obligation created was several rather than joint and several. This alone would not support the decision, but as the added signer was in fact a surety the conclusion is sound, since the original maker's liability in law and equity remained unchanged.

If an obligor signs an obligation after it has been signed by others, in ignorance of the fact that the obligation has been altered or by his signature is altered and that thereby the other obligors are discharged, the obligor signing last is also discharged if the obligee is cognizant of the facts before accepting the obligation. The signature of the last obligor does not bind him, because given under a mistake, induced by what is equivalent to misrepresentation.¹ If, however, the obligee was not notified of the alteration either constructively by the appearance of the document or actually, his legal right to enforce the obligation cannot be defeated by the unknown equity of the deceived obligor.²

If a contract has been avoided by alteration, the subsequent restoration of the writing to its original form without the assent of the obligor will not restore the legal obligation.³ But if the alteration because made by mistake or without wrongful intent was not such as to avoid the obligation, and the document has been restored to its original form, it will be received in evidence and enforced.⁴

Samuel Williston.

[*To be continued.*]

¹ *Ellesmere Co. v. Cooper*, [1896] 1 Q. B. 75; *People v. Kneeland*, 31 Cal. 288; *State v. Craig*, 58 Ia. 238; *Howe v. Peabody*, 2 Gray 556; *State v. McGonigle*, 101 Mo. 353. Cf. *Evans v. Partin*, 22 Ky. L. Rep. 20.

² *Crandall v. Auburn Bank*, 61 Ind. 349; *Rhodes v. Leach*, 93 Ia. 337; *Ward v. Hackett*, 30 Minn. 150. And see numerous cases cited in *Ames Cas. Suretyship* 305 *u.* to the effect that in general fraud or misrepresentation inducing the surety to enter into an obligation is no defense against a creditor innocent and ignorant of the facts. This principle was lost sight of by the court in the contrary decision of *Ellesmere Co. v. Cooper*, [1896] 1 Q. B. 75.

³ *Wood v. Steele*, 6 Wall. 80; *Warpole v. Ellison*, 4 Houst. 322; *Hayes v. Wagner*, 89 Ill. 390, 401; *Robinson v. Reed*, 46 Ia. 219; *Shepard v. Whetstone*, 51 Ia. 457; *Cotton v. Edwards*, 2 Dana 106; *Locknane v. Emmerson*, 11 Bush 69; *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110; *McMurtrey v. Sparks*, 71 Mo. App. 126; *McDaniel v. Whitsett*, 96 Tenn. 10; *Newell v. Mayberry*, 3 Leigh 250.

⁴ *Rogers v. Shaw*, 59 Cal. 260; *Kountz v. Kennedy*, 63 Pa. 187 (see remarks on this case in *Citizens' Bank v. Williams*, 174 Pa. 66).

THE MEDIEVAL LAW OF INTESTACY

DURING the middle ages the last will was usually the epilogue of the last confession.¹ The intestate was regarded with horror as an infamous person who had died unconfessed. For if he had made confession on his death-bed, the priest before granting absolution would have persuaded the dying man to make a will by which he would bestow a part of his movables on the church and the poor for the repose of his soul.² The intestate, therefore, must have died without providing for his salvation; he could not be buried in consecrated soil, and in some parts of Europe his personal property was forfeited to his feudal lord.³ In England during the first half of the thirteenth century the prelates secured the right to distribute such property, but a statute of 1357 required the ordinary to commit the work of administration "to the next and most lawful friends of the dead," who were to make provision for the welfare of his soul and were accountable to the ordinary. The rule was after payment of debts to give a third of his movables to the wife and a third to the children (the bairns' part), while the other third (the dead's part) was expended for pious works; if he left a wife but no children, or children but no wife, the dead's part was a half.⁴

It has recently been asserted that intestacy was rare in England because it was easy to make a will and because the chroniclers

¹ Auffroy, *Évolution du Testament en France*, 555; cf. *ibid.*, 376-84. "Very often a man makes no will until he feels that death is near": Pollock and Maitland, *English Law*, 2nd ed., ii. 340.

² The prelates order that when a man makes a will he should dispose of part of his property for the good of his soul; also that a priest should be present when a will is made: Wilkins, *Concilia*, i. 583, 638, ii. 155, 156.

³ Du Cange, *Glossarium*, s. v. *intestatio*; *Établissements de Saint Louis*, ed. Viолет, iv. 42-49; Caillemer, *Confiscation et Administration des Successions par les Pouvoirs Publics*, 43-54; Pollock and Maitland, bk. ii. ch. vi. § 4. Caillemer believes that in some parts of France the confiscation of the intestate's goods by the lord was not a punishment for a religious offense, but a stage in the development by which serfs obtained the right to dispose of their property.

⁴ On the history of the English law of intestacy, see Selden, *The Disposition of Intestates' Goods* (Collected Works, iii. 1677); Moore, *Reports of Cases heard by the Judicial Committee of the Privy Council*, v. 434-98; Makower, *Const. Hist. of the Church of England*, 428-31; Pollock and Maitland, bk. ii. ch. vi. § 4 (the best account of the subject); on the history of legitim, *ibid.*, bk. ii. ch. vi. § 3.

treat intestacy as a scandal.¹ While the paucity of references to intestates in the records tends to confirm this view, most of the cases referred to by the chroniclers seem to relate to men who had fair warning that death was approaching, not to those who died suddenly; and the coroners' rolls show that such sudden deaths were very common. Therefore, since a man usually made his will on his death-bed,² intestacy could not have been rare; and the records which we shall soon examine show clearly that intestates who died suddenly were regarded with less horror than those who died under normal conditions.

Much obscurity overhangs the English law of intestacy before the thirteenth century. Blackstone, adopting the opinion of Coke,³ says that "by the old law the king was entitled to seize upon his [the intestate's] goods, as the *parens patriae* and general trustee of the kingdom."⁴ On the other hand, Selden and Pollock and Maitland deny that this was ever a prerogative of the crown. Though Coke's contention appears to be untenable, it would not have been strange if the strong English monarchy, adopting the principle of the Norman law, had insisted that the movables of intestates should be dealt with in the same way as those of deceased usurers. The Grand Coutumier of Normandy says that all the chattels of those who, after an illness of nine days or more, die unconfessed, belong to the duke, though some lords possess this right by charter or prescription;⁵ and, according to an inquest made by order of Philip Augustus in 1205 regarding the laws which Henry II. and Richard I. had observed in Normandy, all the movables of an intestate who lay ill in bed three or four days before his death were forfeited to the king or to the lord.⁶ In 1190 the clergy of Normandy claimed, however, that if any one dies suddenly without leaving a will his personal estate should be distributed by the church.⁷ This was evidently a mooted question

¹ Pollock and Maitland, ii. 360, rejecting Selden's opinion that intestacy was common.

² *Ibid.*, ii. 340.

³ Reports, ix. 38 b.

⁴ Commentaries, bk. ii. ch. 32.

⁵ Coutumiers de Normandie, ed. Tardif, ii. 56, ch. 20.

⁶ "Omnia mobilia ipsius domini regis debent esse aut illius in cujus terra est": Teulet, Layettes du Trésor des Chartes, i. no. 785; Duchesne, Hist. Norm. Scriptores, 1060 *cf.* Tardif, Coutumiers de Normandie, i. pt. ii. 93; Delisle, Cat. des Actes de Philippe-Auguste, no. 961.

⁷ "Distributio bonorum ejus ecclesiastica auctoritate fiet": Ralph of Diceto, Imagines Historiarum (Rolls Series), ii. 88.

in Normandy regarding which there were disputes between the lay and ecclesiastical authorities.

Certain passages may be found in the records which at first view seem to lend some support to the theory of Coke and Blackstone, but when carefully scrutinized they fail to carry conviction. For example, in 1255 Henry III. grants to the burgesses of St. Omer that if any of them shall die in the king's dominions testate or intestate, he will not confiscate their goods, but will allow their heirs to have them;¹ probably Henry III. is here merely safeguarding the men of St. Omer against reprisals.² In 1268 the citizens of Dublin contended that the movable property of intestates belonged to the crown, but for this and other misdemeanors they were excommunicated.³ Moreover, various passages in the rolls of the twelfth and thirteenth centuries show that the chattels of intestates were sometimes seized by the king,⁴ but in these cases he was probably exercising this right because he was the feudal lord. In 1284 Edward I. craved a grant of the goods of intestates from Pope Martin IV., to help pay the expenses of his proposed crusade, and met with a refusal,⁵ though a grant of this sort had been made in 1256.⁶ These negotiations with the papacy imply that

¹ Cal. of Charter Rolls, i. 441.

² Cf. Rot. Lit. Claus., i. 620.

³ "Nullus praelatus vel iudex ecclesiasticus . . . de bonis eorum qui intestati decedunt se aliquatenus intromittat, sed fisco bona huiusmodi applicentur": Gilbert, Historic Documents (Rolls Series), 181; Chartae Hiberniae, 32.

⁴ "Aldredus de Muchelegate debet lx. marcas de catallis Reginaldi qui obiit in domum suam (*sic*) sine divisa": Pipe Roll, 16 Hen. II. p. 46. "Rogerus [de Floketorp] cepit de Emma quae fuit uxor Hugonis Flaxenebert de Kyneburl' per manum Eustacii Noth de eadem, executoris dicti Hugonis, eo quod imposuit eis quod dictus Hugo decessit intestatus et quod medietas bonorum suorum fuit domino regi, et ideo cepit xx. s. ad opus suum proprium": 3 Edw. I., Rotuli Hundredorum, i. 447. This was wrongfully exacted, for a jury found that Hugh had died testate. Roger was the bailiff of a manor that had escheated to the king. See *ibid.*, i. 445, 449. See also Rot. Lit. Claus., i. 537 (writ, 7 Hen. III., stating that Richard Fitzdune did not die intestate, and therefore his chattels seized on behalf of the king are to be given to his executors); Close Roll, 17 Hen. III., cited by Selden, Works, iii. 1632 (writ ordering that a parson is to have his mortuary out of the chattels of Robert de Weston, who died intestate). It is difficult to accept Selden's contention that the writ of 7 Hen. III. refers to seizure for a debt due to the king.

⁵ Cal. of Papal Registers, i. 474.

⁶ "Omnia bona mobilia ab intestato decedentium sive de regno Angliae sive de aliis terris [regis Angliae] . . . pro illa portione quae juxta patriae consuetudinem decedentes contingit . . . ad opus . . . regis Angliae ut votum suum efficacius exequi valeat": Rymer's Foedera (Rec. Com.), i. 345. In 1248 Innocent IV. decreed that the goods of intestates should be set aside by the bishops for the needs of the Holy Land: Fournier, Les Officialités, 89. At the parliament of Carlisle, in 1307, complaint was made that officers of the pope demand for his use all the goods of intestates: Rotuli Parl., i. 220.

Henry III. and Edward I. did not regard such goods as the property of the crown.

The evidence at our disposal indicates that, according to the older law of England, the personal property of the intestate was forfeited to the feudal lord. Cnut's doom seems to imply that already before the Norman Conquest the lords were trying to obtain this right: "If anyone dies intestate, be it through his neglect or through sudden death, then let not the lord draw more from his property than his lawful heriot; and according to his direction let the property be distributed very justly to the wife and children and relations."¹ Domesday Book tells us that in the time of Edward the Confessor the king could seize all the goods of his citizens of Hereford dying without a will.² The rule set forth in *Leis Willelme*, ch. 34, that the children of an intestate shall divide the inheritance among them equally,³ may be construed as an assertion against the claims of the lords. The coronation charter of Henry I. says that if any royal vassal meets a sudden death by arms or sickness and makes no disposition of his effects (*pecunia*), his wife, children, kinsmen, or liege men shall distribute them for the good of his soul.⁴ This regulation applies only to royal vassals, and it seems to imply that, except in cases of sudden death, the king as lord might exercise the power of confiscation.⁵ Glanvill clearly states that when any one dies intestate all his chattels are understood to belong to his lord,⁶ and this seems to be confirmed by some entries in the Pipe Rolls of Henry II.⁷ The chapter of John's Great Charter enacting that the chattels of a

¹ Cnut's Laws, ii. ch. 70: Liebermann, *Gesetze*, i. 356.

² Below, p. 126, n. 5.

³ Liebermann, *Gesetze*, i. 514.

⁴ *Ibid.*, i. 522. According to King Stephen's charter, the goods of intestate clerics were to be distributed for the benefit of the soul by the counsel of the church: Stubbs, *Select Charters*, 120; cf. Pollock and Maitland, *English Law*, 2nd ed., i. 519. In 1190 the clergy of Normandy claimed that such goods do not belong to the secular power, but should be distributed by episcopal authority for pious uses: Ralph of Diceto, *Imagines Hist.*, ii. 87.

⁵ According to the *Grand Coutumier* of Normandy and the *Établissements* de Saint Louis, *desperati* or *inconfessi* do not forfeit their movables in case of sudden death, but only after a fatal illness of eight or nine days: Auffroy, *Évolution du Testament*, 556; Du Cange, s. v. *intestatio*. See also the rule laid down by the clergy of Normandy in 1190 and the inquest made in 1205, above, p. 121.

⁶ Bk. vii. ch. 16: "Cum quis vero intestatus decesserit omnia catalla sua sui domini esse intelliguntur; si vero plures habuerit dominos, quilibet eorum catalla sua recuperabit quae in feodo suo reperiet."

⁷ 18 Hen. II., pp. 98, 133.

free man who dies intestate should be distributed by the hands of his near kinsmen or friends under the supervision of the church,¹ seems to have transferred power from the king and other lords to the prelates; and, though this chapter was omitted in the confirmations of the charter, probably because it collided with the interests of the lay lords, the church exercised the right to distribute the personal property of intestates since the second quarter of the thirteenth century² and perhaps since the early part of Henry III.'s reign. The constitutions of Walter of Cantilupe, bishop of Worcester (1240), assert that the distribution should be made under the supervision of the lord and him whom the bishop shall have deputed for that purpose.³ This arrangement looks like a compromise in a struggle between the barons and the prelates or between the principles set forth in Cnut's doom and in John's charter. Bracton's statement of the law of his time is also reminiscent of the older law: "If a free man dies intestate and suddenly, his lord should in no wise meddle with his goods, save in so far as this is necessary in order that he may get what is his, namely, his heriot, but the administration of the dead man's goods belongs to the church and to his friends, for a man does not deserve punishment although he has died intestate."⁴

There are, moreover, indications that in Bracton's day and later the lords remembered their old right, and sometimes tried to assert it in defiance of the church. In the articles presented to Henry III. by the bishops in 1257, it is stated that the king and other feudal lords seize the goods of intestates, and do not permit their debts to be paid or the residue to be applied by the ordinary to the use of the children or kinsmen and to other pious uses.⁵ Lords who do this were threatened with excommunication at the Council of Merton in 1258, and at the Council of Lambeth in 1261.⁶ In 1279 Archbishop Peckham rebukes Llewellyn, prince of Wales, for confiscating "*bona intestatorum vestrorum*";⁷ and in 1305 the bishop of Llandaff complains to Edward I. that the magnates will not

¹ Stubbs, *Select Charters*, 300, ch. 27.

² In 1239 a rule is made regarding the administration of the goods of intestates in the absence of the bishop: Wilkins, *Concilia*, i. 664.

³ *Ibid.*, i. 675.

⁴ Bracton, f. 60 b, ed. Twiss, i. 480. Bracton's text is open to the interpretation that if intestacy is not occasioned by sudden death it may be a cause of forfeiture.

⁵ Matthew Paris, *Chronica Majora*, ed. Luard, vi. 358; Wilkins, *Concilia*, i. 728; cf. *ibid.*, i. 724.

⁶ *Ibid.*, i. 740, 754; cf. *ibid.*, ii. 705.

⁷ *Registrum J. Peckham*, i. 77.

allow him to administer the goods of intestates.¹ The lords also continued, in some parts of England at least, to confiscate the chattels of their villeins dying intestate.²

In the marches of Wales the old law in favor of the lords seems to have been maintained long after the reign of Edward I. In 1278 the lord of Kemes agreed to waive his claim to the property of intestates.³ In 1352 Edward III. ordered three commissioners to inquire whether Sir Henry Hastings, a tenant-in-chief, and others died intestate, and whether, according to the custom of the marches of Wales, all the chattels of tenants dying intestate belonged to their lords. A jury sworn before two of the commissioners in 1354 declare that from time immemorial it has been customary for the lords to have all such chattels.⁴ They say that Sir Henry left a will, but that Grono ap Ievan died intestate during the present reign; his chattels are worth 40s.⁵ An attempt was made to enforce the old custom as late as the reign of Edward VI.⁶

Attention must finally be called to the town charters, which, though they contain many references to intestacy, have been passed over in silence by all writers on this subject. Their examination will confirm the view that long after Bracton wrote his law-book the king and other lay lords still remembered their old right, and that their tenants, in the boroughs at least, regarded exemption from its exercise as a privilege. The following list of references to the evidence on this subject does not profess to be exhaustive.⁷

¹ Memoranda de Parlamento, 1305, ed. Maitland, 73. The king answered that he would not interfere with the custom of the country, meaning perhaps the custom of Wales. For conflicts arising from the claims of the prelates in France, see Auffroy, *Évolution du Testament*, 558-60.

² Court Rolls of the manor of Wakefield, ed. Baildon, i. 256, 260; Rotuli Hundredorum, ii. 758; Pollock and Maitland, 2nd ed., i. 417. Some lords did not permit their serfs to make wills or impeded their execution: Letters from Northern Registers, 73; Wilkins, Concilia, i. 724, 740, 754, ii. 155, 553, 705.

³ "Item si aliquis liber homo de Kemeis decedat intestatus praedictus dominus nihil habebit de bonis intestati": Baronia de Kemeys (Cambrian Archaeol. Assoc.), 59.

⁴ "Consuetudo est in marchia Walliae optata [?] obtenta] et usitata quod domini partium illarum omnia bona et catalla tenentium suorum in partibus illis intestatorum decedentium ratione domini sui praedicti habent et habere consueverunt a tempore quo non extat memoria."

⁵ Baronia de Kemeys, 14, 71.

⁶ *Ibid.*, 15. In 1485 we hear of the office of selling goods of intestates in the county of Flint, — an office which seems to have been in the gift of the king: Rotuli Parl., vi. 353.

⁷ The references are to town charters, excepting those concerning Cardiff, Hereford, Preston, and Tewkesbury, which are to customals or to Domesday Book. The asterisk indicates that the privilege was granted by a baron. Where there is no asterisk the reference is to a royal charter, except in the cases of Hereford and Preston.

- Bala, 1289: Record of Caernarvon, 175.
 Bath, 1256: Warner, History of Bath, app. xlv.
 Beaumaris, 1296: Record of Caernarvon, 159.
 Bere, 1284: Archaeologia Cambrensis, 1849, iv. 216.
 Bristol, 1256: Seyer, Charters of Bristol, 22.
 *Cardiff, before 1183: Clark, Cartae de Glamorgan, iii. 78.¹
 Cardigan, 1284: Placita de quo Warranto, 821.
 Carmarthen, 1257: Charters of Carmarthen, 7.
 Carnarvon, 1284: Record of Caernarvon, 185.
 *Chester, c. 1200: Hist. MSS. Com., viii. 356.²
 Chester, 1300: *ibid.*, viii. 357.³
 Conway, 1284: Record of Caernarvon, 163.
 Cork, 1242: Chartae Hiberniae, 25.⁴
 Criccieth, 1284: Record of Caernarvon, 197.
 Flint, 1284: Taylor, Notices of Flint, 32.
 Guildford, 1257: Cal. of Charter Rolls, i. 456.
 Harlech, 1284: Record of Caernarvon, 193.
 *Haverfordwest, 1219-31: English Hist. Review, xv. 518.⁴
 Haverfordwest, 1291: *ibid.*
 Hereford, 1086: Domesday Book, i. 179 a.⁵
 *Kells, temp. John: Chartae Hiberniae, 17.⁶
 *Kidwelly, 1329: Archaeologia Cambrensis, 1856, ii. 276.⁷
 Kingston-upon-Thames, 1256: Roots, Charters of Kingston, 28.
 *Laugharne, 1300: Archaeologia Cambr., 1879, x. suppl. xlii.
 Newborough, 1284: Record of Caernarvon, 179.
 *Newport (Pembrokesh.), 1192(?): Baronia de Kemeys, 15, 50.⁸
 Northampton, 1257: Cal. of Charter Rolls, i. 459.
 Oswestry, 1398: Shropsh. Archaeol. Soc., Trans., ii. 192.

¹ "Item quacunq[ue] morte burgensis praeoccupatus fuerit, nisi per nequitiam dampnatus, uxor ejus et liberi sui habebunt catalla mortui vel proximi parentes ipsius tanquam heredes si non habuerit uxorem vel liberos." From a customal of the twelfth century.

² "Et si aliquis civis de praedicta civitate in servitio meo occisus fuerit, de catallis suis fiat ac si ipse rationabile testamentum fecisset."

³ Whether they die testate or intestate, the goods of the citizens are not to be confiscated by the king but are to go to their heirs.

⁴ "Heres burgensis quacumq[ue] morte praeoccupati habeat hereditatem et catallum patris sui."

⁵ "Si quis morte praeventus non divisisset quae sua erant, rex habebat omnem ejus pecuniam."

⁶ "Quicumq[ue] praedictorum burgensium de K. sive in terra sive in mari testatus vel intestatus obierit, heres ipsius duodecim denarios in relevium pacabit et hereditatem suam quiete possidebit."

⁷ Henry, duke of Lancaster, grants, 2 Edw. [III.], that if any burgher should die intestate his son and heir shall have his property "without challenge of us or our heirs."

⁸ "Item si burgensis moritur de quacunq[ue] morte morietur, nisi per judicium pro feloniam vitam suam amittat, ego nihil habebō de catallo nisi relevium scilicet xii. d."

*Oswestry, 1407: *ibid.*, ii. 199.

Oxford, 1257: Ogle, Royal Letters, 11.

Pembroke, *temp.* Hen. II.: Cal. of Patent Rolls, 1377-81, p. 107.¹

Preston, *temp.* Hen. II. (?): English Hist. Review, xv. 499.²

Rhuddlan, 1279: Cal. of Patent Rolls, 1272-81, p. 324.

*Saltash, *temp.* Hen. III.: Luders, Reports, ii. 119.³

Shrewsbury, 1256: Owen and Blakeway, Hist. of Shrewsbury, i. 121.

Stamford, 1257: Cal. of Charter Rolls, i. 472.

*Tenby, *temp.* Hen. III.: English Hist. Review, xvi. 103.⁴

*Tewkesbury, before 1183: Clark, Cartae de Glamorgan, iii. 78.⁵

The same formula is used in the royal charters with few exceptions:⁶ the king promises that if any burgesses should die within his dominions testate or intestate, he will not cause their chattels to be confiscated, but the heirs shall have them intact, in so far as it can be shown that they belonged to the deceased, provided that sufficient knowledge or proof of the heirs can be had.⁷ Perhaps the

¹ "Et [si] burgensis ejusdem villae quacumque morte et quocumque loco sive in terra sive in mari sive cum testamento sive sine testamento moriatur, heres suus omnes res suas habeat per donandum xii. d. de relevio."

² "Si burgensis de villa morte subitanea obierit, uxor ejus et heredes sui omnia catalla sua et terras suas quiete habebunt. Ita quod dominus suus nec justiciarii manum ponant in domibus vel in catallis defuncti nisi publice excommunicatus fuerit, sed consilio sacerdotis et vicinorum in elemosinis expenduntur."

³ Reginald de Valle Torta grants to his burgesses: "et quisquis illorum obierit de quacumque morte fuerit, heres ejus catalla ipsius in pace habebit et terram suam per triginta denarios releviabit ad plus."

⁴ "Concedimus quod si quis burgensium praedictorum morte subita, quod absit, moriatur, omnia catalla sua sibi fore salva et heredem suum in hereditatem suam per relevium xii. d. libere introire."

⁵ Customal of Cardiff and Tewkesbury. See above, under Cardiff.

⁶ The exceptions are Chester, Cork, and Pembroke. In the charters of Chester and Cork the formula is merely abbreviated.

⁷ "Si dicti burgenses aut eorum aliqui infra terram et potestatem nostram testati decesserint vel intestati, nos vel heredes nostri bona ipsorum confiscari non faciemus, quin eorum heredes ea integre habeant, quatenus dicta catalla dictorum defunctorum fuisse constiterit, dum tamen de dictis heredibus notitia aut fides sufficienter habeatur." This formula is also used in the baronial charters of Laugharne and Oswestry, and in a grant made by Henry III. to the burgesses of St. Omer (Cal. of Charter Rolls, i. 441); instead of "heirs" the charter of Oswestry (1407) has "heirs and executors." The formula, as set forth above, should be compared with that of a charter granted during the reign of Henry II. by his son Richard to the men of La Rochelle: "Quicumque ex illis sive testatus sive intestatus sive confessus sive non morietur, omnes res ejus et possessiones integre et quiete remaneant heredibus suis et genero suo" (Ordonnances des Rois, xi. 318, from the inspeximus of Louis VIII., 1224). An inspeximus of Alphonse of Poitiers, 1241, adds the words "id est" after "intestatus": Besly, Histoire des Comtes de Poitou, 500. For other grants of this privilege to French towns, see Ordonnances des Rois, xi. 319, 321, 337, 495; Auffroy, Évolution du Testament, 557.

demand for this privilege was stimulated in 1256-57 and 1284 by the negotiations between the crown and the papacy.¹ The charters of baronial towns which state that the chattels of burgesses who die suddenly or "by any sort of death" shall go to their heirs, doubtless refer to cases of intestacy. A grant of Henry II. to La Rochelle tells us that a burgher who breaks his neck or is drowned, has not an opportunity to confess and make his will; therefore his property is to be distributed by his kinsmen and friends for the good of his soul.²

The town records of England give little information concerning the disposition of the goods of the intestate. The rule laid down in the Preston customal seems to mean that out of his estate provision was to be made for the benefit of his soul by the parish priest and the dead man's friends or kinsmen.³ According to the customal of Sandwich, which probably records the usages of the fourteenth and fifteenth centuries, the mayor and jurats have the administration of the *bona intestatorum* in the following manner. The mayor takes with him the jurats and sometimes the rector or vicar of the dead man's parish, and they ascertain what he possessed in money, goods, and debts at the time of his death. Then they appoint two executors, who are sworn to make an inventory. After payment of debts and funeral expenses, the residue is divided into three equal parts, if there is a wife and children; into two equal parts, if there is a wife but no children. Then the dead man's part (the third or half) is distributed for the benefit of his soul; and finally the executors render an account before the mayor and jurats, the friends or kinsmen, and the rector or vicar, if they desire to be present. The record adds that this practice has been in use from ancient times without any contradiction on the part of the archdeacon of Canterbury or any other ordinary.⁴ The dead man's

¹ Above, p. 122.

² "Si vero aliquis eorum colli fractione vel submersione vel aliquo casu subita morte praeventus fuerit et spatium confitendi non habuerit, concedo ut secundum rationabilem dispositionem et considerationem parentum et amicorum suorum res suae distribuuntur et elemosynae fiant pro anima ipsius": Ordonnances des Rois, xi. 319. See also the claim of the clergy of Normandy in 1190, in Ralph of Diceto, *Imagines Hist.*, ii. 88: "Si quis vero subitanea morte vel quolibet alio fortuito casu praeoccupatus fuerit, ut de rebus suis disponere non possit, distributio bonorum ejus ecclesiastica auctoritate fiet."

³ Above, p. 127, n. 2.

⁴ "Ita semper quod de bonis ipsi defuncto pro portione accidentibus fiat testamentum per visum et auxilium amicorum suorum, si interesse voluerint, et distributio [sit] per manus ipsorum executorum debita et fidelis [secundum quod] credunt quod voluntas sua fuerit dum vixerit, et ad elemosinam et vias emendandas pro anima sua juxta

part was probably expended for pious uses in other towns, like London, York, Chester, Bristol, Dublin, and Newcastle-upon-Tyne, where the tripartite division of the chattels of a man with wife and children existed.¹ But Bracton, after speaking of the law of intestacy and the tripartite division of chattels, vaguely intimates that other rules prevailed in some boroughs and cities.² Most of the records say that the personal property of the intestate shall go to his heirs or to his wife and children, without specifying any limitation or legitim. The heirs would, however, probably regard it as a religious duty to do something for the repose of the intestate's soul; and, as at Preston, this would naturally be done with the help or advice of the parish priest. But we hear nothing of the intervention of the ordinary, except at Dublin in 1268, when the citizens resented it;³ and the Sandwich customal expressly excludes any intervention of this sort. Such opposition to the assertion of episcopal authority was to be expected in towns the magistrates of which had the probate of wills. In many boroughs during the

bonorum quantitatem. . . . Et haec solent fieri ab antiquo usque ad nunc sine aliqua contradictione domini archidiaconi Cantuariensis vel alicujus alterius ordinarii": Boys, *Hist. of Sandwich*, 524-5. In some parts of France the priest or the kinsmen might make a will on behalf of the intestate: Auffroy, *Évolution du Testament*, 557; *Recueil des Monuments Inédits*, ed. Thierry, iv. 408. Many bequests were made by the citizens of Bristol for the repair of highways: Wadley, *Abstracts of Wills*, *passim*. Another chapter of the Sandwich customal says that the movables of orphans are at the disposition of the mayor and jurats, "quia apud nos catalla et bona mobilia non accidunt hereditarie heredibus defuncti prout accidunt tenementa, redditus et possessiones," but a portion of such chattels is set aside for masses, the repair of roads, and similar works of charity; thus in 1351 two-thirds were distributed in this way, and only one-third went to the heirs: Boys, 514.

¹ For London, York, and Chester, see Sharpe, *Cal. of Wills*, i. p. xxxiii.; Pollock and Maitland, *English Law*, 2nd ed., ii. 350; Widdrington, *Analecta Eboracensia*, 68, 300; *Statutes of the Realm* (Rec. Com.), vi. 372. The rule laid down in the Chester charter (c. 1200, above, p. 126) seems to imply that there was a definite division of the chattels in that city. The Bristol wills often make a threefold division of movables: Wadley, *Abstracts of Wills*, p. 104, "tertia vero pars sit mihi hoc modo"; cf. *ibid.*, pp. 49, 75-77, 81, 90, 91, 100, 103, etc. For "the dead's portion" (a third) at Dublin, see Gilbert, *Cal. of Records*, i. 129, 131. The custom of Newcastle-upon-Tyne, that the third part of all the goods of a burgher should be inherited by his children, was adopted by the Scotch burghs: *Ancient Laws of the Burghs of Scotland*, ed. Innes, 55, 172. Pollock and Maitland, ii. 362, believe that the eldest son or heir could claim no bairn's part; but, according to the Newcastle custom, he was to have the same portion of the goods as any of the other children. The *Leges Burgorum*, ch. 116, also give a long list of heirlooms or *principalia* which he inherits: *Ancient Laws*, 56, cf. *ibid.*, 171.

² Bracton, f. 61; *Fleta*, bk. ii. ch. 57, § 10; cf. Pollock and Maitland, ii. 350, for a criticism of Bracton's statement regarding London.

³ Above, p. 122. In the same year the citizens of London were excommunicated for admitting wills to probate in the hustings: *Liber de Antiquis Legibus*, 106.

thirteenth and fourteenth centuries the municipal magistrates pronounced on the validity of wills¹ and administered justice on behalf of the legatee whose legacy was withheld,² though this jurisdiction was evidently regarded with disfavor by the prelates.³ The municipal authorities before whom wills were proved would naturally claim the right to administer the intestate's property. "The right to regulate the administration of intestates was too closely connected with the testamentary jurisdiction to be conveniently separated from it."⁴

While we have tried to show that there are indications of a struggle of the feudal lords to obtain or maintain their right to confiscate the chattels of intestates — a struggle which lasted from the time of Cnut to the time of Edward I., and of which we still find reminiscences in the records of the fourteenth century, — the main

¹ For probate in the hustings of London from 1256 onward, see Sharpe, *Cal. of Wills*, i. pp. xlii-xlvi; Liber Albus, 180, 403, 407; Ricart's *Kalendar*, 97-99; Pollock and Maitland, ii. 331. See also *Domesday of Ipswich*, ed. Twiss, 70-86; Bacon, *Annals of Ipswich*, 10, 16, 25-27, 41-46, 50-55, 59-61, 68-73, etc. (wills proved from 1269 onward); *Placitorum Abbreviatio*, 211, 216, 235 (Canterbury, Oxford, and London, *temp.* Edw. I.); Little Red Book of Bristol, ed. Bickley, i. 32, 52-54 (ordinance concerning probate, 1344, etc.); Hist. MSS. Com. xi. pt. iii. 188 (grant by Edw. II. that wills touching tenements in King's Lynn shall be proved and enrolled before the mayor); Owen and Blakeway, *Hist. of Shrewsbury*, i. 382; Oliver, *Hist. of Exeter*, 222; Widdrington, *Analecta Eboracensia*, 71. These references suffice to modify or confute the opinion of Bracton and the decision of the royal judges, 19 Edw. I. (Pollock and Maitland, ii. 330), that the jurisdiction over bequests of burgage tenements belonged to the ecclesiastical courts. In some boroughs a will was proved first before a representative of the bishop, and afterwards before a town magistrate in the gildhall: Wadley, *Abstracts of Bristol Wills*, 3, 5, 7, etc.; Manship, *Hist. of Yarmouth*, 405; Bacon, *Annals of Ipswich*, 41; Tighe and Davis, *Annals of Windsor*, i. 324; Registers of Walter Bronescombe, etc., ed. Hingeston-Randolph, 436 (Exeter); Hist. MSS. Com., xi. pt. iii. 233-4 (King's Lynn). Perhaps a canon of Boniface's Constitutions (1261, Wilkins, *Concilia*, i. 754; cf. *ibid.*, i. 550, ii. 705) may be directed against this practice: "Item testamentis coram ordinariis locorum probatis et approbatis eorundem probatio seu approbatio testamentorum a laicis nullatenus exigatur." Though the records emphasize the claim of the burgesses that wills devising burgage tenements should be proved in the borough court, many of the wills thus proved (for example, at London, Bristol, and King's Lynn) bequeathed chattels only, or both chattels and land.

² Since the first half of the fourteenth century we hear of actions in the borough courts by the writ *ex gravi querela* to recover bequests of burgage tenements: Little Red Book of Bristol, ed. Bickley, i. 33; Liber Assisarum, f. 232, 250; *Law Quarterly Review*, i. 265. As early as 1291 the legatee had a remedy in the borough court of Ipswich against the executors who would not give him seisin: *Domesday of Ipswich*, ed. Twiss, 72, 82.

³ Liber de Antiquis Legibus, 106; Letters from Northern Registers, 71.

⁴ Stubbs, in Report of Eccles. Courts Commission, 1883, p. xxiii. He makes this statement in speaking of the jurisdiction of the church tribunals.

object of this paper has been to call attention to the fact that throughout the thirteenth century many boroughs were purchasing from their lords a favor or privilege which, according to Bracton, was the right of every free man. In the very decade when Bracton was asserting that the lord shall not meddle with the intestate's goods, the lords were selling a burghal franchise which implied that they had the right to seize such goods. The importance of personal property in boroughs, which was due to the predominance of mercantile over agricultural interests, would naturally make both the lords and the burgesses inclined eagerly to assert their claims against the pretensions of the prelates. The old law of intestacy, as set forth by Glanvill, pressed more heavily upon the tradesmen, whose wealth was made up mainly of chattels, than upon rural freeholders and villeins. It is not strange, therefore, that the town law since the thirteenth century strove to reject the pretensions of both lords and prelates, and to establish the rule that the chattels of the intestate should go to his kinsmen, who would, however, be expected to devote a portion of his property to pious works for the atonement of his sins and the benefit of his soul.

Charles Gross.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table: —

	1893-94.	1894-95.	1895-96.	1896-97.	1897-98.	1898-99.
Res. Grad.	—	—	—	—	I	I
Third year	66	82	96	93	130	102
Second year	122	135	138	179	157	169
First year	140	172	224	169	216	218
Specials	23	13	9	31	41	58
Total	351	402	467	472	545	548

	1899-1900.	1900-01.	1901-02.	1902-03.	1903-04.	1904-05.
Res. Grad.	—	I	I	—	4	I
Third year	134	144	149	167	180	182
Second year	193	202	190	196	201	232
First year	232	241	229	228	293	285
Specials	51	58	59	49	60	58
Total	610	646	628	640	738	758

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts: —

HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90

GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154

HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	TOTAL OF CLASS.
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285

As the forty-one Harvard seniors in the first year class have in each instance completed the work required for the Harvard A. B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School. Of the fifty-eight special students, twenty-four have entered this year, and of these twenty are graduates of a college or university, four having received a degree in law.

One hundred and fourteen colleges and universities have representatives now in the School as compared with one hundred and eleven last year and ninety-four the previous year. In the first year class sixty-nine colleges and universities, as compared with sixty-three last year, are represented, as follows: Harvard, 90; Yale, 16; Brown, 13; Dartmouth, 12; Williams, 9; Amherst, 8; Bowdoin, 6; California, Colby, Holy Cross, Nebraska, 4; Cornell University, Illinois College, Stanford, Notre Dame, Ohio Wesleyan, Wesleyan (Ct.), 3; Bates, Chicago, Georgetown College, Hamilton, State College of Kentucky, Princeton, Washington and Jefferson, Western Reserve, 2; University of Alabama, Amity, Bethany, Cambridge, Cincinnati, Colorado College, De Pauw, Drury, Earlham, Georgetown University, Hamilton, Haverford, Howard, Indiana, Iowa University, Iowa Wesleyan, Johns Hopkins, Lake Forest, Lehigh, Manhattan, Massachusetts Institute of Technology, Mercer, Michigan, Missouri, College City of New York, North Carolina, Oberlin, Ohio State, Oregon, Oxford, Pomona, Rochester, St. Vincent's, Swarthmore, Syrian Protestant, Texas, Tufts, Tulane, Union (Ky.), Valparaiso, Vermont, Wabash, Waynesburg, Wisconsin, Wooster, 1. There are at present in the School ten law school graduates, of whom three have received also an academic degree, representing the following law schools:

Baldwin, Cincinnati, Dalhousie, Dickinson, Harvard, Kings (Windsor), University of Illinois, Maryland, New York University, Washington University (Mo).

THE THEORY OF A "FEDERAL COMMON LAW."—Although it is the general policy of the federal courts to follow the decisions of the state courts on questions of interpretation of statutes, still, as a recent case shows, if the rights of the parties have been fixed by contract before the state courts have adjudicated upon the statute, the federal courts will exercise their independent judgment, and may declare a statute valid which the supreme court of the state has adjudged void as in contravention to the state constitution. *Great Southern Fireproof Hotel Co. v. Jones*, 193 U. S. 532. In like manner, the common law rules laid down by the supreme court of the state may be disregarded by the federal courts.¹

The cases establishing this latter doctrine have been made the basis of a theory that there is a federal common law as distinguished from that of the separate states. Starting with the proposition that the common law is adopted by the state itself and is promulgated in the decisions of its supreme court, it is contended that when the rules applied by the federal courts differ from those enforced by the state courts, the federal courts are following a law of their own. Since the judges describe this law as general in contradistinction to local,² it must be considered a federal common law. To strengthen this conclusion, appeal is made to the analogy of admiralty and maritime jurisdiction where unwritten law is enforced exclusively by the courts of the United States;³ and on historical grounds it is maintained that the government of the United States has succeeded to the common law jurisdiction of Great Britain.

The argument from analogy to admiralty is hardly tenable, because, aside from the inherent difference between the admiralty and common law systems,⁴ the analogy is equally applicable to criminal and civil common law; and it was early settled that the Federal courts have no common law jurisdiction in criminal cases.⁵ The same answer might controvert the historical argument, were that argument supported by facts. Although the common law, in so far as it was suited to local conditions, existed in the separate colonies at the time of the Revolution,⁶ it was never specifically adopted by the general government.⁷ The Supreme Court by repeatedly affirming that there is no common law of the United States⁸ has denied an implied adoption, and an examination of the cases where the federal courts apply rules different from those applied by the courts of the state in which the action arises, will show no true grounds for the contrary contention.

The laws of each state consist of the Constitution of the United States and the laws and treaties made under it, and the constitution, statutes and

¹ *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368.

² See *Railroad Co. v. National Bank*, 12 Ot. (U. S.) 14, 31-32; *Myrick v. Michigan Central Railroad Co.*, 17 Ot. (U. S.) 102, 109.

³ See *Murray v. Chicago & Northwestern Ry. Co.*, 62 Fed. Rep. 24.

⁴ See *The Lottawanna*, 21 Wall. (U. S.) 558.

⁵ *United States v. Worral*, 2 Dall. (U. S.) 384; see *State of Penna. v. Wheeling, etc.*, *Bridge Co.*, 13 How. (U. S.) 518, 563.

⁶ See *U. S. v. Reid*, 12 How. (U. S.) 363.

⁷ See *Gatton v. Chic. R. I., & P. Ry. Co.*, 95 Ia. 112.

⁸ See *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 583-584.

common law of the state. The Constitution of the United States and the laws made under it are the laws of the state because expressly adopted by the people of the state.⁹ The federal courts are, therefore, courts of the state, and as such administer state laws. That the federal court may differ from the state court in its interpretation of the common law, as in the principal case it differed from it in the interpretation of a statute, is due to the fact that they are courts of co-ordinate power with no common superior. Such difference in interpretation results in uncertainty as to what is the law but does not create two systems of law upon the same subject-matter. The conception of a federal common law as a "general system of jurisprudence hovering over local legislation and filling up its interstices"¹⁰ is fundamentally opposed to the basic principle of our common law that there is no law apart from territory.

SUCCESSIVE ASSIGNEES OF A MORTGAGE DEBT, EACH WITH A LEGAL RES. — Both the courts which regulate the rights of successive assignees of the same *chose in action* by priority of notice to the obligor¹ and those which apply the rule of priority of assignment² agree that where the obligation is contained in an instrument the assignee who obtains the instrument prevails.³ This harmony of opinion results from the general policy of equity not to deprive a purchaser of any legal advantage which he has acquired without taint of conscience. In applying this doctrine the courts have gone to great lengths. For example, when a party to an action had a common law right to refuse to testify, equity would not grant against a *bona fide* purchaser a bill for the discovery of evidence which would prejudice him in his honestly purchased rights.⁴ Nor would it, in an action of ejectment, restrain him from setting up the purely technical and unmeritorious plea of a satisfied outstanding term in a third person.

In view of these principles, facts such as are presented by a late New York case seem to raise a rather complicated question. The obligee of a bond secured by mortgage assigned the debt and delivered the bond to A. Later he assigned the same debt to B, to whom he surrendered the mortgage deed. Both A and B were *bona fide* purchasers for value. *Syracuse Savings Bank v. Merrick*, 96 N. Y. App. Div. 581. The court was relieved of the necessity of deciding the case on its merits because A had failed to record his assignment as required by statute, but the same case has arisen where consideration of the registry system was not involved. The courts, starting with the well established rule of mortgage law that an assignment of the debt carries with it the security,⁵ have held that A, who gets the debt by getting the instrument containing the obligation, is entitled to preference whether the assignment to him precedes⁶ or follows⁷ that to B.

⁹ Simonton, *The Federal Courts*, 2d ed., 31; see *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 403.

¹⁰ Duponceau, *Jurisdiction of Federal Courts* 87.

¹ English, etc., *Trust v. Brunton*, [1892] 2 Q. B. 1; *Third Nat. Bank of Philadelphia v. Atlantic City*, 126 Fed. Rep. 413.

² *Putnam v. Story*, 132 Mass. 205.

³ *Bridge v. Connecticut Life Ins. Co.*, 152 Mass. 343; see *Re Gillespie*, 15 Fed. Rep. 734.

⁴ See *Emmerson v. Ind, Coope & Co.*, 33 Ch. D. 323.

⁵ *Whittemore v. Gibbs*, 24 N. H. 484.

⁶ *Morris v. Bacon*, 123 Mass. 58.

⁷ *Kernohan v. Manss*, 53 Oh. St. 118; *Boyle v. Lybrand*, 113 Wis. 79.

Do these decisions deprive B of a legal right which he has obtained for value and without a charge upon his conscience? The answer must depend entirely upon the right which he actually gets by his bargain. And it would seem that he gets nothing more than a security title which he is only conditionally entitled to retain. If the obligee first assigns to B and delivers the mortgage but retains the bond, he must hold the bond on a constructive trust for the benefit of B. B holds the mortgage title as security for the payment of the debt, but with full knowledge that it is a mere security title. Consequently, he must be taken to know that his right to retain that security depends wholly upon his interest as *cestui que trust* in having the debt paid to his trustee. He, of course, intends to perfect his right to the security by later obtaining possession of the bond; but if in the meantime the obligee, in violation of the constructive trust, assigns and delivers the bond to A, who has no notice of the trust, B's rights as *cestui* sink, and his right to the security perishes with them. The same conclusion must be reached where A's assignment is prior, for the measure of B's right in that which he knowingly takes as security is his right in the obligation secured.

RIGHT TO TRIAL BY JURY IN CRIMINAL CASES UNDER THE FOURTEENTH AMENDMENT. — The fourteenth amendment to the Constitution of the United States provides that no state shall "deprive any person of life, liberty, or property, without due process of law." From state legislation which would infringe this right to "due process," an appeal lies to the federal courts.¹ The District Court of the Southern District of Georgia lately decided that this amendment guarantees a jury trial to municipal offenders sentenced to infamous punishment; and that a Georgia statute providing for the summary infliction of such punishment was unconstitutional. *Jamison v. Wimbish*, 130 Fed. Rep. 351. This case raises the question how far the amendment necessitates a jury trial in criminal cases. The courts which have interpreted the amendment most favorably for the principal case have gone no further than to say that it confirmed this right in all cases where the accused had it by the system of law obtaining in the state prosecuting him, at the time of the adoption of the amendment.² From the earliest times magistrates have exercised summary jurisdiction over municipal offenses.³ This was the practice in Georgia at the time the amendment was adopted.⁴ Nor does the infliction of infamous punishment entitle the prisoner to a jury trial. Such punishments were imposed summarily by justices of the peace at common law.⁵ If then cases such as the principal case were dealt with summarily by the common law of Georgia at the time the amendment was adopted, and infamous punishment could be inflicted by a court without a jury, the constitutional provision was not violated by the Georgia statute.

It is not proposed, however, to reach this result merely on the ground that the principal case is not within even the above interpretation of the amend-

¹ *Allen v. Georgia*, 166 U. S. 138, 140; *Wilson v. North Carolina*, 169 U. S. 586, 593.

² *Callan v. Wilson*, 127 U. S. 540, 549; *In re Kemmler*, 136 U. S. 436, 448.

³ See *Byers v. Commonwealth*, 42 Pa. St. 89; *Green v. Superior Court of San Francisco*, 78 Cal. 556.

⁴ *Williams v. City Council of Augusta*, 4 Ga. 509; *Floyd v. Commissioners of Eatontown*, 14 Ga. 354.

⁵ See 3 Burn, *Justice of the Peace*, 30th ed., 142; see also *St. of James I.*, c. 4.

ment, but rather on the theory that the fourteenth amendment does not include the right to trial by jury. The authorities cited by the court in the principal case in support of the right to such trial are hardly in point ;⁶ since those cases arose in federal jurisdictions where the fifth and sixth amendments applied ;⁷ and these amendments have no application to prosecutions for crimes against a state.⁸ On the other hand Justice Bradley, who in the slaughter-house cases carried the force of the fourteenth amendment further than any other member of the court, later said with reference to this amendment : " There is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for its territories."⁹ States should be allowed to do away with jury trial to-day as readily as they could before 1870. On this ground only, can the extension by statute of equity jurisdiction be supported. To limit states to the procedure then in vogue would make no allowance for progress in systems of judicature induced by new conditions. Nor does it seem right so to interpret the amendment as to sanction summary conviction in one state and to forbid it in another, merely because the one had allowed itself such jurisdiction before 1870, and the other had not. Any legal procedure in accord with the established usage in England and America and in conformity with the constitution and laws of the United States, or with its treaties, should be considered " due process of law."¹⁰ Such an interpretation of " due process " is adopted by the Supreme Court in civil cases ;¹¹ and while this question has not been squarely raised in criminal cases, there seems no reason for holding that what is " due process " as to the former is not " due process " as to the latter, since the same safeguards are extended to " life, liberty, or property."

PART PERFORMANCE UNDER THE STATUTE OF FRAUDS. — It is well established that equity will not allow one party to an oral contract for the sale of land to set up the statute of frauds when the other party, in reliance on this contract, has partially performed.¹ In determining what acts constitute a sufficient part performance to take the case out of the statute, the English courts and the majority of the courts in this country seem to require only that the acts must be overt, and of such a nature that they may be unequivocally attributed to the existence of an oral agreement.² Under this rule the courts have held that mere entry by the purchaser under the oral contract was enough to take the case out of the statute,³ while on the other hand a tenant in possession who made improvements on the premises relying on an agreement to extend his lease was denied specific performance because his acts, not being inconsistent with the original tenancy, could not be unequivocally attributed to the existence of the parol agreement.⁴ Such

⁶ *United States v. Johanssen*, 35 Fed. Rep. 411 ; *In re Mills*, 135 U. S. 263 ; *Callan v. Wilson*, *supra*.

⁷ *In re Sawyer*, 124 U. S. 200 ; *Eilenbecker v. Plymouth Co.*, 134 U. S. 31.

⁸ *Brooks v. Missouri*, 124 U. S. 397.

⁹ *Missouri v. Lewis*, 101 U. S. 22, 31.

¹⁰ *Hurtado v. California*, 110 U. S. 538 ; *Lowe v. Kansas*, 163 U. S. 81, 85.

¹¹ *Walker v. Sauvinet*, 92 U. S. 90 ; see also *Hallinger v. Davis*, 146 U. S. 314.

¹ *Browne*, Stat. of Frauds, ch. xix. ; *Mundy v. Jolliffe*, 5 Myl & Cr. 167.

² *Maddison v. Alderson*, L. R. 8 App. Cas. 467 ; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638.

³ *Pain v. Coombs*, 1 De G. & J. 34.

⁴ *Frame v. Dawson*, 14 Ves. Jun. 385.

an arbitrary requirement can be based only on the notion that a court of equity will enforce a contract whenever it is sufficiently satisfied of its existence. Since, however, the statute of frauds expressly provides that all contracts for the sale of land must be evidenced in writing signed by the party to be charged,⁵ the court in upholding a contract proved in any other way is acting in direct contravention to the statute. The ground, if any, for equitable interference in such cases is that the defendant should be charged, not upon the contract itself, but upon the equities resulting from its partial execution,⁶ thus enforcing specific performance apart from the statute of frauds, and not in spite of it. In conformity with this reasoning several states in this country, notably Massachusetts, follow a rule seemingly superior to that laid down by the majority of jurisdictions. The case usually arises in the following way: The plaintiff enters upon the land and in reliance on the contract to convey erects improvements costing more than their intrinsic value, so that even if he were allowed a quasi-contractual action he could not recover adequate damages. In consequence of these cases, it is commonly said that part performance, in order to take the case out of the statute of frauds, must consist of a change of possession accompanied by such acts on the part of the purchaser that adequate compensation can be given him only by a conveyance of the premises.⁷ From this it might appear that change of possession is necessary and that the plaintiff must always be the purchaser. But since the rule would seem to depend on the fact that unless specific performance is granted, the plaintiff will inevitably be damaged through his reliance on the defendant's representations, a proper case for its application may readily arise, where there is no change of possession and the plaintiff is the seller. An example is furnished by the facts of a late English case, where the plaintiff, in reliance on the defendant's oral promise to buy a portion of his land, built a house on it according to the latter's specifications. *Dickenson v. Barrow*, [1904] 2 Ch. 339. Though the case went off on another point, if the improvements made in anticipation of the sale were more expensive than valuable, it is difficult to see why specific performance should not have been granted here under the Massachusetts rule.

PURCHASE FROM THE GRANTOR OF A DEED IN ESCROW. — Delivery of the deed is necessary to pass the title to land, and escrow is a method of delivery. Under the general rule, this delivery does not avail to pass the title until the performance of the conditions or the happening of the contingency upon which the deed is held in escrow;¹ but if for any reason such as insanity, coverture, or death, the grantor becomes incapacitated from passing title before the delivery out of escrow, this second delivery is by the fiction of relation carried back to the time of the delivery into escrow so as to make the title pass as of that time.² Since then, in the ordinary case, it is not the grantor's deed until the second delivery, the question arises whether a subsequent grantee getting a conveyance before the performance of the conditions of the escrow would get a title indefeasible at

⁵ Stat. 29 Car. II., ch. iii. sec. iv.

⁶ *Per* Selbourne, L. J., in *Maddison v. Alderson*, *supra*.

⁷ *Glass v. Hurlbert*, 102 Mass. 24; *Burns v. Daggett*, 141 Mass. 368.

¹ *Smith v. South Royalton Bank*, 32 Vt. 341.

² *Webster v. Kings County Trust Co.*, 145 N. Y. 275.

law. It is the policy of the law to favor the grant in escrow. At least it is not regarded as just that one charged with notice of the grant in escrow should nevertheless take a complete legal title; and all jurisdictions agree that he cannot, though there may be an exception where the original grantee is a volunteer. Since however the cases reach this result on different grounds, a conflict arises as to whether an innocent purchaser will take a complete legal title.

Some jurisdictions cut off the intervening grant to a purchaser with notice by extending the use of the fiction of relation.³ But as it is a general doctrine that a fiction invoked to do justice should not be used against innocent third parties,⁴ in these jurisdictions a *bona fide* purchaser from the grantor of a deed in escrow takes an indefeasible title,⁵ and this doctrine has been recently followed. *Emmons v. Harding*, 70 N. E. Rep. 142 (Ind., Sup. Ct.).

Other jurisdictions do not allow an innocent purchaser to defeat the grantee in escrow.⁶ These jurisdictions hold that after the deed is placed in escrow the grantor no longer has full legal title. The grant in escrow puts the land out of his power and makes it possible for the grantee to get something analogous to specific performance at law. All that the grantor has is a title subject to a defeasance, and a title subject to a defeasance is all that a purchaser from him, whether *mala fide* or *bona fide*, can buy.⁷ Therefore, notwithstanding the intervention of third parties, the grantee in escrow gets a full legal title upon performance of the conditions.⁸ The latter decisions invoke no fiction in reaching this result and seem to support the better rule.

COMMUNICATION OF REVOCATION. — An offer to make a contract is good, generally speaking, until revoked. A question presenting considerable difficulty, however, is whether knowledge by the offeree, indirectly acquired, that the offeror intends to revoke or has done an act inconsistent with the continuance of the offer, is sufficient revocation. The leading case on the subject is *Dickinson v. Dodds*.¹ The defendant offered to sell to the plaintiff certain land. On the following day knowledge came indirectly to the plaintiff that the defendant was negotiating a sale of the property to another; whereupon the plaintiff, before any notice of revocation had been communicated to him by the defendant, handed the latter an acceptance of his offer. The defendant, having already sold the land to another, refused to perform, and the plaintiff brought a bill in equity against the defendant and his vendee. The court refused to grant specific performance. The case has been followed in Maryland,² and is again approved and followed in a late Wyoming case. *Frank v. Stratford-Handcock*, 77 Pac. Rep. 134. While in each of these cases the plaintiff is praying specific performance, which it would seem could not be granted in any event, since the vendee's right to the property is equal and arose prior to

³ *McDonald v. Huff*, 77 Cal. 279.

⁴ *Viner's Abdg. tit. "Relation."*

⁵ *Wolcott v. Johns*, 7 Col. App. 360.

⁶ *Hall v. Harris*, 5 Ired. Eq. (N. C.) 303.

⁷ *Hooper v. Ramsbottom*, 6 Taunt. 12; *Fort v. Beekman*, 1 Johns. Ch. (N. Y.) 288.

⁸ *Leiter v. Pike*, 127 Ill. 287.

¹ L. R. 2 Ch. D. 463.

² *Coleman v. Applegarth*, 68 Md. 21.

that of the offeree, if any, and his conscience cannot be charged by his mere knowledge that a revocable offer was outstanding when he made his agreement with the offerer, yet the cases test the validity of the acceptance, for under modern practice equity can award damages where it is impossible to grant specific performance. This was not done, the court in each instance granting no relief whatever, placing its decision on the broad ground that the attempted acceptance, after knowledge of the negotiation or sale, was ineffectual, and that no contract was formed.

In support of the holding of the above cases, this argument is made: the legal fiction that an offer is repeated during every moment from the time it leaves the offerer until revocation or acceptance, amounts to a presumption raised at the moment of acceptance that justifies the offeree in assuming that the offerer is still of the same mind. This presumption, however, cannot be raised when the contrary is known to the offeree to be the fact. Again, when the offerer knows that knowledge of the sale is reasonably certain to reach the offeree, as proves to be the fact, and when the offeree as a reasonable man must understand such notice as revocation of the offer, why require the offerer to say in so many words, "I revoke my offer"? Is it not enough to put upon him the risk of having two contracts on his hands in case his expectation of notice reaching the offeree is not realized?

Both theoretically and practically, however, it would seem that the authority on this point is open to serious objection. An offer which comes to the offeree indirectly, through the casual report of a third person, cannot be so accepted as to impose a binding contract on the offerer;⁸ and a revocation should in principle be subject to the same rule. Moreover, as a practical matter, in order to compel the offeree to rely upon the information, must it be absolute knowledge of a completed sale, or is mere notice of pending negotiations sufficient? Suppose the information is false but believed to be true; or true but reasonably believed to be false; or wholly uncertain and indefinite; in any case the offeree is placed in a doubtful and embarrassing situation. All of these difficulties could easily be obviated by requiring in every case that the revocation be directly communicated.

ESTOPPEL THROUGH FAILURE TO ACT.—Under the law of estoppel duties are imposed, liability for the breach of which, though it does not subject the wrong-doer to any direct action, is none the less rendered effective in that he is prevented from asserting a right which he otherwise would have had. A case decided recently in the Supreme Court of Canada seems to go very far in imposing a duty of this kind. The defendant, living in Montreal, received a notice from the plaintiff, a stranger living in Toronto, asking him to provide payment against a note of his in the plaintiff's hands. In a suit on the note, the court held that since the defendant did not telegraph at once that the note was a forgery and thus save the plaintiff loss from paying out the proceeds which had been placed to the credit of the party discounting the note, the defendant is estopped to assert the forgery. *Ewing v. Dominion Bank*, 40 Can. L. J. 468.

It is fairly well settled that in case A stands by and sees B sell A's land

⁸ *Canney v. South, etc., R. R. Co.*, 63 Cal. 501.

to C, A is estopped from subsequently asserting his title to C's damage.¹ The principal case seems indistinguishable. Both cases agree in imposing a duty to give notice, a duty to speak the truth.

Whence arises this duty and what are its limits? In the absence of privity the law hesitates to impose upon a man a duty to act, and in these cases we have no privity. At first sight the obligation seems based upon a duty, purely moral, to save another from harm. Yet, clearly, if one hears casually that a note to which his signature has been forged is being sold to a stranger, he will not suffer any liability through a failure to warn the stranger.² The moral obligation to speak does not become a legal one when silence will merely mean that another is not helped, but only when another, who is rightfully relying on the representation, will be injured by such silence. Where A knows that B, in a matter in which both are interested is acting or going to act in the ordinary course of affairs with reference to his, A's, conduct, and in the reasonable belief that that conduct represents the truth, then A should take care that his conduct does represent the truth. If he allows his conduct to represent a falsehood, and B relying thereon, changes his position, then A will not be allowed subsequently to set up what is true to B's damage. To permit A to do so would be to sanction a fraud. Therefore the courts decide in such a case that if a party wishes to preserve to himself a right at some later day to set up the truth, there is a present obligation upon him to act truthfully.³

In the principal case the conduct which the plaintiff had a reasonable right to expect from the defendant, both being business men, was conduct in accordance with business custom. The business custom in these cases is to reply in due course of post. A rule, therefore, requiring a telegram hardly seems supportable. But with that exception, the decision seems a salutary one. The growth in the size and intricacy of business enterprises makes it increasingly necessary to place confidence in the conduct of strangers. And within the narrow limits of the rule laid down, it seems

o strictly enforce truthfulness of conduct by way of estoppel.

RECOVERY UNDER THE CODE ON CONTRACTS FOR THE BENEFIT OF THIRD PERSONS. — A recent article makes the assertion that the code provision allowing the real party in interest to sue, settles conclusively the question of recovery by the beneficiary under a contract made between other parties for his benefit. *Suits on Contracts for the Benefit of Third Persons*, M. E. E. Kerr, 66 Alb. L. J. 312. The statement, moreover, is one that is frequently met.¹ That it in fact has not had this effect is shown by the state of the law on this subject in code states. When recovery has been allowed, it has frequently in code states, as in others, been based wholly on the general law and not at all on the code provision.² In some code states, however, the decisions have been put on the latter ground.³ The reason

¹ Wendell v. Van Rensselaer, 1 Johns. Ch. (N.Y.) 344; Osborn v. Elder, 65 Ga. 360.

² See Bigelow, Estoppel, 5th ed., 596 et seq.

³ See Blackburn, J., in Swan v. North British Australasian Co., 2 H. & C. 175, 182; see Cababé, Estoppel, Appendix.

¹ 7 Am. & Eng. Enc. 109; 15 Enc. Pl. & Pr. 717.

² Emmitt v. Brophy, 42 Oh. St. 82; Larson v. Cook, 85 Wis. 564.

³ Rice v. Savery, 22 Ia. 470; Ellis v. Harrison, 104 Mo. 270.

this view is not the prevailing one is apparent when we consider the difficulty met with in construing the word "interest." If it is used in its popular sense, the provision leads logically to conclusions which even the courts so using it feel themselves bound to disapprove. For since an accidental beneficiary may in this sense be quite as deeply interested in the performance of a contract as an intended beneficiary, this construction, if followed, must inevitably result in giving a right of action to persons whose benefit under the contract, though material, was neither contemplated nor desired by the contractors. This is of course not the law.⁴ That the courts do not consistently follow the popular construction is further shown by the fact that even in code states there are instances where a sole beneficiary has not been allowed to sue,⁵ and that in New York the creditor cannot sue a firm on its obligation to pay the liabilities of an outgoing partner.⁶ In all these cases, the plaintiff has an interest in the popular sense, yet recovery is denied.

The other and perhaps the preferable view is that the word "interest" in the code is used in a legal sense. But if this is so, it cannot be said that any person has an interest, whose rights are recognized neither in law nor in equity.⁷ In this view the result of the enactment is merely to "abolish so far as can be done the distinction between rights at law and in equity,"⁸ leaving it still to be decided whether a plaintiff aside from the code has any right equitable or legal. "No new right of action is created."⁹ In the case of a sole beneficiary, it may be that an equitable right exists, founded on the fact that the promisee has no adequate remedy, and that both parties intended the beneficiary to have an enforceable right under the contract.¹⁰ If such a right should be granted by the courts of equity, the code would have the effect of changing it to a legal one. Aside from this consideration, which is at least doubtful, it is probable that the code provision has properly no effect on the enforcement of contracts for the benefit of a third person.

THE LIMITS OF ABSOLUTE PRIVILEGE ATTACHING TO LEGISLATIVE AND JUDICIAL REPORTS.—Broadly speaking, a defamatory statement honestly made in protecting an interest or performing a duty is privileged.¹ Whenever the occasion is such that the public good demands unfettered speech, the private right to reputation must yield. In most cases the privilege is qualified; if it is abused it is forfeited. But there is a class of cases where absolute immunity prevails. In this class are legislative and judicial proceedings, and, by statutes, official reports of such proceedings. How far does the privilege given to such documents extend? Does the imprimatur of the government attach immunity to the document itself and carry its protection to whatever use it may be put? The Court of Appeals of the Dis-

⁴ *Wainwright v. Queens County Water Co.*, 78 Hun (N. Y.) 146; *Chung Kee v. Davidson*, 73 Cal. 522; *Davis v. Clinton, etc., Co.*, 54 Ia. 59.

⁵ *Townsend v. Rackham*, 143 N. Y. 516; *Jefferson v. Asch*, 53 Minn. 446; *Vrooman v. Turner*, 69 N. Y. 516.

⁶ *Wheat v. Rice*, 97 N. Y. 296.

⁷ *Cf.* 15 HARV. L. REV. 778.

⁸ Bliss, *Code Pleading*, 2d ed., § 47.

⁹ *Harris, J.*, in *Hodgman v. Western R. R. Co.*, 7 How. Pr. (N. Y.) 492.

¹⁰ This seems a possible explanation for *Moore v. Darton*, 4 De G. & S. 517.

¹ *Harrison v. Bush*, 5 E. & B. 344.

trict of Columbia answers this question in the affirmative. The defendant showed a defamatory report, concerning the plaintiff contained in a Senate document, and it was held that, since it was a public document, there was no libellous publication. *De Arnaud v. Ainsworth*, 32 Wash. L. Rep. 662. Publication, in the law of libel, has a technical meaning. Any communication of defamatory matter to a third person is publication and every new communication is a fresh publication.² One in any way putting a libel in the hands of another is legally responsible therefor. This rule has been relaxed in favor of newsvendors and innocent carriers. But even in the case of a newsdealer each sale raises a presumptive liability;³ and while courts sometimes say there was not "sufficient publication," what is meant is that the occasion was privileged.⁴ It cannot be denied, therefore, that showing a public report is a publication and creates a *prima facie* liability.

Does the nature of the document, then, absolve the defendant? At the common law, no privilege attached to the publication of parliamentary reports outside of the House of Commons.⁵ After the famous case of *Stockdale v. Hansard*⁶ decided that authorization by Parliament does not attach a privilege, the act was passed which absolutely privileged all official reports, and in this country there are similar statutes. It would seem that this government authorization should not give any further immunity than that incidental to printing and distributing by the proper authorities. The doctrine of absolute privilege is clearly one to be invoked only by the requirements of necessity, and courts are most zealous to confine its application.⁷ True, a public document is available to all, but does that sanction its use to satisfy private motives? A must submit to the printing and proper distribution of a public document even though he is thereby defamed, but that should not permit B wantonly to disseminate the libel. Or may B, who obtained the insertion of a personal attack on A in the Congressional Record, distribute or exhibit copies of the paper with impunity? Or, if enjoined from further publishing a libel, may he widely circulate the official reports containing the prohibited libel and thus practically annul the injunction? Surprising possibilities result from the present decision. Further, once granting its correctness, what difference how the subsequent publication is made? If showing the report is privileged, why not a verbatim reprint or repetition? In somewhat analogous cases in England it has been held that an honest publication of extracts from public registers kept by act of Parliament gives a qualified privilege.⁸ The same result ought to be reached in any subsequent publication, in the technical meaning of that term, of all official legislative and judicial documents. To privilege their use absolutely, however, seems an unwarrantable extension of a heretofore strictly limited doctrine.

² Odgers, Libel, 3d ed., 178.

³ *Emmen v. Pottle*, 16 Q. B. D. 354.

⁴ Odgers, Libel, 3d ed., 191.

⁵ *Ibid.*, 208.

⁶ 9 A. & E. 1.

⁷ See *Stevens v. Sampson*, 5 Ex. Div. 53, 55; *Royal Aquarium, etc., Society v. Parkinson*, [1892] 1 Q. B. 431.

⁸ *Searles v. Scarlett*, [1892] 2 Q. B. 56.

RECENT CASES.

AGENCY — LIABILITY OF PRINCIPAL FOR ACTS OF INDEPENDENT CONTRACTOR — LANDOWNER'S LIABILITY TO INVITED PERSON. — The defendant, owning a park, engaged a company to give an exhibition of fireworks to which the public were charged admission. The details of the work and the men who performed it were entirely under the control of the company. During the exhibition the plaintiff, one of the spectators, was injured by a rocket negligently discharged by one of the workmen. *Held*, that the defendant is not liable, as the damage was caused by the negligence of an independent contractor. *Devo v. Kingston, etc., R. R. Co.*, 94 N. Y. App. Div. 578.

It is a well-recognized rule of law that an employer is not liable for the acts of an independent contractor. *King v. New York, etc., R. R. Co.*, 66 N. Y. 181. On the other hand, one who invites others to come upon his premises must use due care to render them reasonably safe, and cannot avoid this duty by the employment of an independent contractor. *Curtis v. Kiley*, 153 Mass. 123. Hence, where the work is of a dangerous nature, the landowner must not only use reasonable care in the selection of the contractor, but he must also see that due precautions are taken to prevent harm. The ground of liability is not the negligence of the contractor, but that of the landowner in failing to keep his premises in a reasonably safe condition. *Thompson v. Lowell, etc., Ry. Co.*, 170 Mass. 577. In the present case, the only question appears to be whether the defendant was in fact negligent; for the exhibition was not of such a hazardous nature as to render him liable irrespective of negligence. *Cf. Sebeck v. Platideutsche, etc., Verein*, 64 N. J. Law 624.

AGENCY — LIABILITY OF PRINCIPAL TO THIRD PERSON IN TORT — STOCK CERTIFICATE FORGED BY SECRETARY OF COMPANY. — The secretary of a company borrowed money from the plaintiff for his own purposes, as the latter knew, and gave as security an alleged certificate of shares in the company. The certificate was apparently regular in form and was countersigned by the secretary as required; but the company's seal was fraudulently affixed and the directors' signatures were forged. The secretary absconded and the plaintiff sues the company for refusal to register the shares. *Held*, that the company is not estopped to deny the validity of the forged certificate, nor responsible for its officer's wrongful act. *Ruben v. Great Fingall Consolidated*, [1904] 2 K. B. 712.

It is English law that to make the principal liable in such a case the fraud must be committed by the agent not merely in the apparent scope of his employment, but also for the benefit of the principal. *British Mutual Banking Co. v. Charnwood*, 18 Q. B. D. 714; *George Whitechurch, Ltd. v. Cavanagh*, [1902] A. C. 117. The United States Supreme Court has shown a tendency toward the English doctrine. See *Friedlander v. Texas, etc., Ry.*, 130 U. S. 416. But general American law does not require that the fraud be for the principal's benefit. *New York, etc., R. R. v. Schuyler*, 34 N. Y. 30; *Tome v. Parkersburg Branch R. R.*, 39 Md. 36. This, it is submitted, is the sounder view: the motive of the wrongdoer seems immaterial on the question of the liability of the person who has given him power so to harm another. The court in the present case seems content with the English doctrine, but the same result would probably be reached in this country. Under the American rule only a *bona fide* purchaser without notice is protected. And one buying, as in this case, from the agent, known to be acting for himself, is accordingly without remedy against the principal, as the circumstances should put him on inquiry as to the title of the agent. *Moores v. Citizens' National Bank*, 111 U. S. 156; *Farrington v. South Boston R. R. Co.*, 150 Mass. 406.

ASSIGNMENTS FOR CREDITORS — MARSHALING ASSETS — SURRENDER OF SECURITIES. — The plaintiff having lent to the defendant's assignor ten thousand dollars, and received as collateral security notes held by the debtor, petitioned for its share of the dividends declared after the general assignment. *Held*, that the plaintiff may surrender the collaterals and share in the distribution upon its entire claim, or deduct the face value of the security from the debt and receive dividends upon the balance. *Union & Planters' Bank of Memphis v. Duncan*, 36 So. Rep. 690 (Miss.).

The decision is opposed to the result reached in a majority of jurisdictions, though the cases are in conflict. See *Merrill v. National Bank of Jacksonville*, 173 U. S. 131;

Wurts v. Hart, 13 Ia. 515. The holder of collateral security does not by accepting it surrender his primary right against the debtor personally. When the debtor makes a general assignment, the personal right is converted into an equitable claim against the assets in the hands of the assignee, which remains equally distinct from the right against the security. *Paddock v. Bates*, 19 Ill. App. 470. Hence the creditor should be permitted to collect dividends upon his entire claim and to supply any deficiency out of the proceeds of the collaterals. Should the dividends plus the proceeds exceed the amount of the debt, the creditor will hold the balance in trust for the assignee. See *Graeff's Appeal*, 79 Pa. St. 146. If in consequence the secured creditor recovers his entire claim while other creditors do not, this is but the natural result of foresight in obtaining security. Statutes, however, in some jurisdictions require the surrender of collaterals as a condition to receiving dividends upon the whole claim. See *Swedish-American National Bank v. Davis*, 64 Minn. 250.

BILLS AND NOTES—DELIVERY—ACCOMMODATION PAPER DISCOUNTED BY OTHER THAN PAYEE.—The defendant executed an accommodation note payable to a certain bank for the purpose of enabling a friend to raise money by having it discounted. The bank having refused to discount it, the plaintiff was induced to do so. The latter brought suit upon the note in his own name. *Held*, that the plaintiff may recover. *Bull v. Latimer & Helm*, 80 S. W. Rep. 252 (Tex., Civ. App.).

The result of the principal case is open to the technical objection, deemed fatal in many jurisdictions, that the note in the hands of the plaintiff is really not a valid instrument, since it has never been delivered to the payee. *First National Bank of Centralia v. Strange*, 72 Ill. 559. Some courts, however, hold that it is desirable to let the plaintiff recover on the note, because, the object of the note being merely to raise money, it must ordinarily be immaterial to the maker by whom it is discounted. Accordingly a number of jurisdictions allow recovery, but require the suit to be brought in the name of the payee. *Bank of Rutland v. Buck*, 5 Wend. (N. Y.) 66. If recovery is to be allowed at all in such a case the Texas court seems logical in allowing the plaintiff to bring the action in his own name; for the bank having refused to discount the note can have no more property in it than the plaintiff, and so no technical consistency is gained by requiring the action to be brought in its name.

CARRIERS—PERSONAL INJURIES TO PASSENGERS—INSULTS BY SERVANT.—The defendant's conductor refused to return to the plaintiff her change, and abused her in the presence of her fellow-passengers. *Held*, that the plaintiff may recover for mental humiliation. *Gillespie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347.

For a discussion of the principles involved, see 15 HARV. L. REV. 670.

CARRIERS—WHEN A CARRIER BECOMES WAREHOUSEMAN.—The plaintiff, a consignee of certain goods carried by the defendant company, lived outside of its delivery limits. The goods were stolen after the plaintiff had made arrangements to have them removed, but before a reasonable time for their removal had elapsed. *Held*, that the defendant company is liable. *Burr v. Adams Express Co.*, 58 Atl. Rep. 609 (N. J., Sup. Ct.).

The law of New Jersey upon this point has previously been regarded as unsettled. This decision, however, seems to place that state squarely among the jurisdictions holding that liability as a common carrier continues until the consignee has had a reasonable time to remove the goods. See 9 HARV. L. REV. 153.

CONFLICT OF LAWS—RIGHTS OF PROPERTY—VALIDITY OF FOREIGN CHATTEL MORTGAGES.—A debtor executed a chattel mortgage to the plaintiff in Illinois which was duly recorded in that state. The property was taken into Tennessee and there levied upon by local creditors of the mortgagor. The plaintiff brought replevin. *Held*, that the defendant cannot be charged with constructive notice of the mortgage and is entitled to priority. *Snyder v. Yates*, 79 S. W. Rep. 796 (Tenn.).

The position taken by the Tennessee court that a mortgage recorded in another state is not effective against creditors attaching property which has been brought into Tennessee, seems to reverse the stand previously taken by that state on this question. See *Bank v. Hill*, 99 Tenn. 42. The holding of the court is supported by several states. *Corbett v. Littlefield*, 84 Mich. 30. The majority of decisions however, take the view that a chattel mortgage validly executed and recorded according to the requirements of the state where made, is valid in every state into which the property may be brought, against purchasers or attaching creditors, unless contrary to some rule of statutory or common law policy. *Parr v. Brady*, 37 N. J. Law 201. Against this view it may be urged that a recording statute can have no force outside of the jurisdiction enacting it and that creditors of a foreign state having no access to the record cannot be charged

with notice. The answer to this would seem to be that since by the statute of the state having jurisdiction of the *res* the chattel mortgage passed title good against third parties, that title should be protected wherever found.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — BREACH OF CONTRACT OF SERVICE MADE INDICTABLE. — A statute was enacted in Alabama making it a penal offense for any laborer who should make a written contract of service and then abandon his employment without the consent of his employer and without sufficient excuse, to make a similar contract with a second party without informing him of the previous agreement. *Held*, that the statute is unconstitutional under the Constitution of Alabama and under that of the United States. *Toney v. State*, 37 So. Rep. 332 (Ala.).

For a discussion of the principles involved, see 17 HARV. L. REV. 121.

CONSTITUTIONAL LAW — RIGHT TO TRIAL BY JURY — PROTECTION AFFORDED BY THE FOURTEENTH AMENDMENT IN CRIMES AGAINST THE STATE. — By a state statute the recorder of Macon was authorized to sentence summarily certain municipal offenders to not more than six months on the county chain gang, a body composed of felons and municipal offenders, and used for labor on the public works. The petitioner being accordingly condemned to serve on such chain gang applied to the federal court for a writ of *habeas corpus*. *Held*, that the writ should be granted, since the statute providing for the infliction of such punishment without a jury trial is unconstitutional. *Jamison v. Wimbish*, 130 Fed. Rep. 351 (Dist. Ct., S. D. Ga.). See NOTES, p. 136.

CONSTITUTIONAL LAW — VESTED RIGHTS — PUBLIC OFFICE. — *Held*, that an officer appointed for a definite time to a public office has not a vested property interest therein, or contract right thereto, of which the legislature cannot deprive him. *Mial v. Ellington*, 46 S. E. Rep. 961 (N. C.).

This decision overturns a long line of cases in North Carolina and brings the law of that state on the point involved into harmony with the law prevailing in the rest of the Union. See 14 HARV. L. REV. 218.

CONSTRUCTIVE TRUSTS — MISCONDUCT BY NON-FIDUCIARY — TITLE ACQUIRED BY MURDER HELD SUBJECT TO CONSTRUCTIVE TRUSTS. — A wife held a policy of insurance on the life of her husband, payable to her if she should survive, otherwise to his representatives. The husband murdered the wife and then killed himself. Her representatives sought to recover the proceeds of the policy from his representatives, who had received it, by agreement, subject to this suit. *Held*, that they are entitled to recover. *Box v. Lanier*, 79 S. W. Rep. 1042 (Tenn.).

For a discussion of the questions of title and of equitable interest involved, see 9 HARV. L. REV. 474; 14 *ib.* 375.

CORPORATIONS — FOREIGN CORPORATIONS — WHAT CONSTITUTES DOING BUSINESS. — The plaintiff, a foreign corporation, having sold to the defendant some machinery through an order taken and filled by its local agent, sued on a note given for the purchase price. *Held*, that the single transaction constitutes a doing of business, within the statute barring corporations doing business in the state from maintaining an action without having obtained a certificate. *John Deere Plow Co. v. Wyland*, 76 Pac. Rep. 863 (Kan.).

As the Kansas court points out, the usual statement, that the doing of a single act of business does not constitute the doing or carrying on of business within the meaning of statutes requiring certificates, has generally been made in reference to isolated and incidental transactions. See *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Commercial Bank v. Sherman*, 28 Ore. 573. The suggestion here advanced that where the single transaction indicates a purpose to carry on a substantial part of the corporation's dealings within the state, the certificate must be obtained, seems sound. If this were not so, any corporation would be entitled to complete at least one transaction without obtaining a certificate, however clear and indisputable its intention to carry on business in the state regularly thenceforward. This would conflict with the legislature's intent to protect citizens in all their dealings with foreign corporations. See *Farrior v. New England, etc., Co.*, 88 Ala. 275. The practical difficulty of determining whether the single transaction evidences a purpose to engage in business permanently, is one of fact purely, and is properly for the jury. *Oakland Sugar Mill Co. v. Wolf Co.*, 118 Fed. Rep. 239.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY — DAMAGES. — An action was brought under a statute providing for the recovery of damages by the widow or personal representative of a person killed through negligence or default. *Held*, that

though mortality tables may be produced to assist the jury in estimating the decedent's expectancy of life, they may not be used to show the probable duration of the life of the plaintiff, widow of the decedent. *Emery v. Philadelphia*, 208 Pa. St. 492.

The general rule under similar statutes is that the damages recoverable are those suffered by the beneficiaries, not the loss to the decedent's estate. *Rajnowski v. Detroit, etc., R. R. Co.*, 74 Mich. 20. Under Lord Campbell's Act, the jury apportion the sum recovered among the beneficiaries according as each has been damaged. The Pennsylvania statute, like those of most states, provides for its distribution among the beneficiaries in proportion as they would take the decedent's personalty in case of intestacy. The inconsistency arising under this mode of distribution, of allowing a recovery based on the damage to the several beneficiaries, and then dividing the whole arbitrarily, has been noted. *Richardson v. New York, etc., R. R. Co.*, 98 Mass. 85; *Richmond v. Chicago, etc., R. R. Co.*, 87 Mich. 374. This consideration leads the court in the present case to base the damages solely on the husband's expectancy, independently of the fact that the wife's may be much shorter, and her loss consequently less than the damage done to the decedent's estate. By general authority elsewhere, damages are based on the joint expectancy of the two. *Hall v. Germain*, 14 N. Y. Supp. 5. On examination of the Pennsylvania decisions it would appear that the court, in striving for consistency, has deviated from established precedent to avoid a hypothetical complication concerning only the distribution of the damages and not necessarily involved in the main issue. Cf. *Caldwel v. Brown*, 53 Pa. St. 453; *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. St. 185.

DEEDS — DELIVERY IN ESCROW — SUBSEQUENT SALE BY GRANTOR BEFORE HAPPENING OF CONTINGENCY. — A father, in consideration of the release of a debt, made a deed of land to his daughter, which he delivered to a stranger to give to the daughter upon his death. Subsequently the father made a grant of the same land to the defendant, who knew all the facts. After the father's death, the daughter brings this action to quiet title. *Held*, that the plaintiff is entitled to relief, since title is in her by relation from the time of delivery. *Emmons v. Harding*, 70 N. E. Rep. 142 (Ind., Sup. Ct.). See NOTES, p. 138.

EQUITY — JURISDICTION — REMOVAL OF CLOUD ON TITLE ACQUIRED UNDER STATUTE OF LIMITATIONS. — *Held*, that equity will not grant a decree confirming the title to land claimed by possession under the statute of limitations. *Miller v. Robertson*, 24 Can. L. T. 205 (Can., Sup. Ct., April, 1904).

This decision can be reached only on the ground that adverse possession does not ripen into title, for where one is in possession and has title a bill *quia timet* will lie. *Holland v. Challen*, 110 U. S. 15, 20. It seems now generally recognized that one in possession for the statutory period gains an undisputed legal title. *Scott v. Nixon*, 3 Dr. & War. 388. For most purposes, the statute should not be regarded as merely stripping the owner of all remedy. It extinguishes his title and vests it in the adverse possessor. It is against the very purpose of statutes of limitations, in their nature statutes of repose, to deny a bill for the destruction of the existing paper title. *Arrington v. Liscon*, 34 Cal. 365. The present case seems clearly wrong on theory and is against overwhelming authority. In accord are only two jurisdictions. See *McCoy v. Johnson*, 70 Md. 490; *Contee v. Lyon*, 19 D. C. 207. The argument that whether title was, in fact, acquired through adverse possession is properly determinable at law ought to have no weight. If only equity can afford relief, it is no objection that a question of fact must be decided.

EQUITY — JURISDICTION — WINDING UP A BENEFIT SOCIETY. — Employees of a company formed a voluntary association for the payment of sick benefits and old age pensions out of the dues. The society was neither incorporated nor registered. After the company ceased business, the association gained no new members so that its funds became unequal to the increasing liabilities, present and contingent. A majority of the members accordingly voted for a dissolution by the court and commenced for this purpose an action in equity in which all classes of members were represented. *Held*, that equity has jurisdiction. *In re Lead Company's, etc., Society*, [1904] 2 Ch. 196.

This jurisdiction is not rested on the equity jurisdiction for the dissolution of partnerships, because a benefit society is not a partnership, since it has neither the purpose nor the incidents of one. See *Fleming v. Hector*, 2 M. & W. 172. Nor is the jurisdiction confined to relief against the fraud or the illegal acts of the officers, nor to societies where the funds are held in trust for the members. See *Atnip v. Tennessee Mfg. Co.*, 52 S. W. Rep. 1093 (Tenn.). The basis of the jurisdiction is the recognized purpose of equity to protect property rights which have no adequate protection at law.

See *Rigby v. Connel*, L. R. 14 Ch. D. 482, 487. In the principal case it was apparent that the society was steadily losing assets; that, if the pensions were continued, the contingent rights of the younger members would be worth nothing; in short that the society was insolvent and could no longer fulfil its mission. The court gave the only adequate protection to the property rights of the members, — a winding up of the society. Most of the law of friendly societies is comparatively modern and unsettled, but this jurisdiction of equity is supported by the few authorities in point. See *Pearce v. Piper*, 17 Ves. 1; *Reeve v. Perkins*, 2 Jac. & W. 390.

ESTOPPEL — ESTOPPEL IN PAIS — FAILURE TO ACT. — The plaintiffs, bankers in Toronto, discounted a note purporting to bear the defendants' signature and placed the proceeds to the credit of the holder. On the same day that the defendants, merchants in Montreal, received from the plaintiffs a notice to provide payment at maturity, the plaintiffs paid out the proceeds of the discount. If the defendants had wired notice that the signature was a forgery this payment would have been stopped, but a letter sent in due course would have been too late. *Held*, that since the defendants did not telephone or send a telegram, they are estopped to assert the forgery. *Ewing v. Dominion Bank*, 40 Can. L. J. 468 (Can., Sup. Ct., June, 1904). See NOTES, p. 140.

EVIDENCE — DECLARATIONS CONCERNING BODILY CONDITION. — The plaintiff was injured in a railroad collision. Evidence was offered that a witness who was not a physician had heard him say with his hands on his head, "Oh, if I could only get rid of these headaches." *Held*, that the evidence is admissible. *Cashin v. New York, etc., R. R. Co.*, 185 Mass. 543.

Evidence of statements of present physical suffering is generally admitted when the physical condition of the person making the statement is in issue, and evidence of statements of past suffering is generally excluded. *State v. Fournier & Co.*, 68 Vt. 262. This rule is not universal, however, and in a few states no evidence of assertions of pain is admitted unless the assertions were made to a physician. *Davidson v. Cornell*, 132 N. Y. 228. In Massachusetts and a few other jurisdictions, evidence of statements of past suffering is admitted when the statements were made to a physician. *Roosa v. Boston Loan Co.*, 132 Mass. 439. In the principal case, since the statement was not made to a physician, the admission of the evidence had to be rested solely on the ground that it was a statement of present suffering. Although no authority directly in point has been found, the court seems to have been justified in holding that it was admissible on that ground. The statement necessarily carried with it an idea of past suffering as proof of which the evidence would be inadmissible; but since it also clearly referred to present pain it was not on that account objectionable.

EXECUTORS AND ADMINISTRATORS — DUTIES — LIABILITY FOR DEFAULT OF COEXECUTOR. — One of two joint executors received certain checks in discharge of a mortgage debt due the estate, and another debt was paid to him in cash. He forwarded both checks and cash to his coexecutor, who represented himself as having opportunity to make an investment to better advantage. The latter cashed the checks, kept their proceeds and the money received, and later became insolvent. *Held*, that the executor who originally received the checks is not liable to the estate for their proceeds, but is liable for the cash received and turned over to his coexecutor. *In re Johnson*, 87 N. Y. Supp. 733.

In cases of joint administration, each executor has power over the whole of the estate. He is therefore not liable for waste or misappropriation by his coexecutor of funds which the latter collected. *Duncan v. Davison*, 40 N. J. Eq. 535. But for that part of the estate which he himself collects he is responsible, and cannot ordinarily evade liability by turning the funds over to a coexecutor. *Langford v. Gascoyne*, 11 Ves. Jun. 333. In New York, however, it is held that receipt of a check is not receipt of the money, and that the executor who cashes the check is alone responsible. *In re Provost*, 87 N. Y. App. Div. 86. This distinction seems difficult to support. The executor who receives the check can, and ordinarily should, present it for payment and hold the proceeds for the estate; how by turning the check over to his coexecutor he escapes the responsibility which would attach to him if he cashed it and remitted the proceeds, it is hard to see. And it would seem that in this particular a check is like a bond or note, for which an executor under such circumstances is liable. *Townsend v. Barber*, Dick. 356; *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166.

FEDERAL COURTS — RELATION OF STATE AND FEDERAL COURTS — EFFECT OF DECISION OF STATE COURT ON THE VALIDITY OF A STATUTE UNDER THE STATE CONSTITUTION. — *Held*, that where rights have been fixed under a contract before an

adjudication by the state courts upon the validity of a statute under the state constitution, the federal courts may declare a statute valid which the state courts have declared void. *Great Southern, etc., Co. v. Jones*, 24 Sup. Ct. Rep. 576. See NOTES, p. 134.

FRAUDULENT CONVEYANCES — TRANSFERS FOR VALUE — COVENANT IN CONSIDERATION OF MARRIAGE TO CONVEY ALL AFTER-ACQUIRED PROPERTY. — By an ante-nuptial settlement a man settled property on his wife and children and covenanted to convey on similar trusts all property, except business assets, which he should acquire during the joint lives of himself and wife. Later, after giving notice of suspension of payment, he conveyed a house and furniture worth £17,000 to the trustees of the settlement and soon after was adjudicated a bankrupt. *Held*, that the conveyances are not void under Stat. 13 Eliz. c. 5, against fraudulent conveyances. *Re Rejs, Ex parte Clough*, 23 Law Notes 169 (Eng., C. A.).

It is well settled that from the point of view of bankruptcy proceedings marriage is a good consideration for a conveyance. *Fraser v. Thompson*, 1 Giff. 49; *Tolman v. Ward*, 86 Me. 303. Nor can creditors avoid a conveyance in pursuance of an ante-nuptial agreement to settle a fixed sum. *Ex parte McBurnie's Trustees*, 1 DeG. M. & G. 441; *Kinnard v. Daniel*, 13 B. Mon. (Ky.) 496. But it has always been supposed that such a contract, to be valid against creditors, was limited to what was reasonable under all the circumstances. See *Ex parte McBurnie's Trustees*, *supra*; *Goldsmith v. Russell*, 5 DeG. M. & G. 547. An earlier case is opposed to the present decision, holding a contract to convey all future-acquired property void against creditors as contrary to the plain reason and policy of the law, whether made with actual intent to defraud or not. *Ex parte Bolland*, L. R. 17 Eq. 115. The earlier decision seems preferable. In spite of the exception of business assets from the operation of the contract, the decision reached in the present case would allow a business man practically to exclude his future creditors from realizing upon his estate. The argument sometimes advanced that such a contract may be specifically enforced is not conclusive against the right of third parties to avoid it. *Seymour v. Wilson*, 19 N. Y. 417.

HIGHWAYS — INJURIES FROM OBSTRUCTIONS — LIABILITY OF PERSONS OBSTRUCTING FOR INJURIES TO PASSERS-BY. — The defendant unlawfully obstructed the sidewalk by placing large boxes upon it, in passing which the plaintiff slipped on vegetable matter dropped by a third person, and fell. But for the defendant's obstruction, she would probably not have stepped where she did. She sues the defendant for injuries caused by the fall. *Held*, that the plaintiff may recover. *Garibaldi and Cuneo v. O'Connor*, 112 Ill. App. 53.

In the present case, the court seems to create a new liability on the part of a person who unlawfully obstructs the sidewalk. The effect of the decision is to impose upon him an absolute liability to passers-by for injuries caused by its condition. No other case has been found which goes to this extent. The authorities cited by the court seem to be based upon the ground that the obstruction was the proximate cause of the injury. *Cf. Murphy v. Leggett*, 164 N. Y. 121. In the principal case, however, the unlawful obstruction maintained by the defendant was at most only a *causa sine qua non*; and it is clear that, generally speaking, the commission of an act without which the injury would not have occurred is not enough, in itself, upon which to base a liability. It therefore seems that in the absence of authority in support of the doctrine enunciated, the court might fairly have refused to hold the defendant liable.

INJUNCTIONS — ACTS RESTRAINED — NUISANCES. — The defendant had erected enormous blast furnaces at great expense. These furnaces were continually throwing out ore dust which fell upon the plaintiff's property in large quantities, creating a nuisance. *Held*, that a permanent injunction will issue to restrain the defendant from so using its furnaces. *Sullivan v. Jones and Laughlin Steel Co.*, 57 Atl. Rep. 1065 (Pa.).

This decision seems, in effect, to overrule an earlier Pennsylvania case and to place that state among the jurisdictions which, in issuing a permanent injunction, disregard the fact that it will damage the defendant far more than it will benefit the plaintiff. *Cf. Richards's Appeal*, 57 Pa. St. 105. The plaintiff's remedy at law in these cases is plainly inadequate. In most jurisdictions he is put to repeated actions for damages which fail to compensate him, and in all he is left unable to prevent the virtual taking of his property for the private purposes of the defendant. Notwithstanding this, the cases in accord with the earlier decision hold that the injunction is a matter of grace, and as such should not be granted where it is against the balance of convenience. *Huckenstine's Appeal*, 70 Pa. St. 102. This result amounts to a grant of immunity to a person who has made a sufficiently expensive outlay on the instruments of his tort.

The recent decision seems to take the better view, that a plaintiff having shown a continuing nuisance, can demand the injunction as of right. *Hennessy v. Carmony*, 50 N. J. Eq. 616.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — PUBLIC DOCUMENTS. — The defendant handed to a third person a defamatory report concerning the plaintiff contained in an official copy of a Senate document. *Held*, that any use of such a document is absolutely privileged. *De Arnaud v. Ainsworth*, 32 Wash. L. Rep. 662 (D. C.). See NOTES, p. 142.

MORTGAGES — MERGER OF INTERESTS — DISCHARGE OF THE OBLIGATION. — A testator devised mortgaged property to certain beneficiaries. The executor paid the mortgage debt and took an assignment of the bond and security. Thereafter he assigned them to a third party who brought a bill of foreclosure. *Held*, that by the payment, the mortgage and bond are discharged, and the assignee acquired no right. *Hetzl v. Easterly*, 96 N. Y. App. Div. 517.

On the principle that the security follows the obligation, courts have held that payment of the debt by the debtor discharges the mortgage and leaves the mortgagee nothing which he can assign. *Brown v. Lapham*, 3 Cush. (Mass.) 551; *Androsoggin Savings Bank v. McKenney*, 78 Me. 442. It would seem, however, that since a mortgage gives an interest *in rem*, a merger, destroying the legal interest of the mortgagee, could occur only when the estates of the mortgagor and mortgagee are united in one person. See *Mickles v. Townsend*, 18 N. Y. 575, 582. Accordingly a *bona fide* purchaser of the mortgaged property, from an assignee of the mortgage who has fulfilled an obligation to pay the debt for the benefit of the mortgagor's estate, is protected. See *Real, etc., Co. v. Rader*, 53 How. Pr. (N. Y.) 231. Again, the extinguishment of the claim by the statute of limitations does not discharge the mortgage. *Norton v. Palmer*, 142 Mass. 433. In neither case could the holder of the mortgage be protected if the pledge were released upon the discharge of the obligation. The true doctrine would seem to be that the one bound to pay the debt must, upon getting the security, hold it in trust for the mortgagor. The same result would be reached in the principal case, since the assignee from the executor was not an innocent purchaser.

MORTGAGES — PRIORITIES — PRIORITY OF RECORDED ASSIGNMENT OF MORTGAGE OVER UNRECORDED ASSIGNMENT. — *Held*, that an assignee of a mortgage debt who received the bond is postponed to a later assignee who received the mortgage deed and was prior in recording his assignment. *Syracuse Savings Bank v. Merrick*, 96 N. Y. App. Div. 581. See NOTES, p. 135.

NEGLIGENCE — DUTY OF CARE — LIABILITY OF THIRD PARTY FOR INJURIES TO TRESPASSER. — The defendant company allowed a wire on the land of a third party to remain charged with electricity, without his permission. The property in the wire, which had been broken and was hanging near the ground, was in the landowner. In playing on the premises, as children of the neighborhood occasionally did, the plaintiff touched it and received a shock. *Held*, that the defendant is liable. *Daltry v. Media, etc., Co.*, 208 Pa. St. 403.

As a general rule a trespasser cannot recover from a landowner for injuries caused by the unsafe condition of the premises. *Sullivan v. Boston, etc., Co.*, 156 Mass. 378. But in the present case, he was allowed to recover from a third person who was responsible for their dangerous condition. The court based its decision upon the ground that as the defendant had no right in the premises, he was on an equal footing with the plaintiff, and could not plead an owner's exemption from liability. The case appears to be sound. On principle, the fact that the plaintiff was a trespasser seems insufficient to excuse the defendant from the liability which he would otherwise have incurred. The ultimate reason for exempting a landowner from liability in such a case seems to be the public policy of allowing him to make the most beneficial use of his land — a reason that obviously does not operate to excuse the present defendant.

OFFER AND ACCEPTANCE — REVOCATION — NECESSITY OF COMMUNICATION. — The plaintiff, who was in possession of the defendant's land under a lease with an option to purchase, forfeited the lease and was evicted by a purchaser from the defendant. The plaintiff later notified the defendant that he accepted the offer to sell contained in the original option, and upon the defendant's refusal to convey brought a bill for specific performance against the defendant and his vendee. *Held*, that the lease having been forfeited, the option remains as a mere revocable offer, and cannot be made into a binding contract by the plaintiff's acceptance after knowledge of the conveyance to another. *Frank v. Stratford-Handcock*, 77 Pac. Rep. 134 (Wyo.). See NOTES, p. 139.

PATENTS—INJUNCTION AGAINST ACTS CONTRIBUTING TO INFRINGEMENT. —

The defendants were engaged in manufacturing certain component parts of an article patented by the plaintiff which they sold to parties who were engaged in infringing the patent. The plaintiff sought to restrain the defendants on the ground of infringement. *Held*, that the defendants are not guilty of infringement even though they know the parts are used in infringing the patent. *Dunlop, etc., Co. v. Moseley & Sons*, 91 L. T. R. 40 (Eng., C. A.).

The American and English decisions on the question raised by the principal case are in square conflict. According to the English view, the owner of a patent has no right against one knowingly selling component parts to a person who uses them in infringing the patent. *Townsend v. Haworth*, cited in *Sykes v. Howarth*, 12 Ch. D. 826, 831. Under the American rule, a manufacturer of a component part of an article which he knows is to be used in infringing the patent, is liable as a contributory infringer. *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65. Under the English view, it would seem that some irresponsible person might get manufacturers to furnish different parts to be used by him in infringing the patent. Against such a person damages would be inadequate and an injunction would be the only remedy. After he was enjoined, some other such person could continue the performance with the manufacturers. There seems to be no valid objection against holding one who is thus furnishing the means of infringement and is reaping part of the benefit, accountable to the patentee. The American rule justly grants the needed protection to the holder of the patent.

POLICE POWER — REGULATION OF BUSINESS — CHARGES OF EMPLOYMENT AGENCIES. — A statute made it unlawful for an employment agent to receive as compensation more than 10 per cent of the first month's wages in the employment furnished. *Held*, that the statute is not within the police power, and contravenes the constitutional guarantee of protection to property. *Ex parte Dickey*, 77 Pac. Rep. 924 (Cal.).

The constitutional right to make contracts is not unlimited, and interference by the police power seems increasing. Limitations may be imposed where public health or safety is concerned, and in business affected with a public interest so as to be virtually a monopoly, charges may be fixed. *Munn v. Illinois*, 94 U. S. 113. A conflict, however, exists as to the state's right to interfere to prevent oppression where people only nominally on an equality are contracting. Thus weekly payment acts and "truck acts" have been sustained. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13; see *Opinion of the Justices*, 163 Mass. 589. Other courts have denounced them as destroying the constitutional liberty of contract. *Republic, etc., Co. v. State*, 160 Ind. 379; see *Vogel v. Pekoc*, 157 Ill. 339. Usury laws, the validity of which is unquestioned, look toward the prevention of oppression doctrine, but the argument is weakened by the fact that historically they are restrictions on a privilege, and that they existed before the Constitution. Employment agencies do not seem within the doctrine of *Munn v. Illinois supra*. It is true they may be regulated to prevent fraud. *Price v. People*, 193 Ill. 114. But as to fixing rates the present decision seems correct; the doctrine of protection from oppression, if valid at all, seems one to be strictly confined if everybody is not to be put under legislative tutelage.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — ENFORCEMENT OF RESTRICTIONS — SUIT BY INTERMEDIATE LESSOR. — The plaintiff assigned to the defendant a lease subject to negative covenants by the plaintiff, and the defendant agreed to perform the covenants and to indemnify the plaintiff against them. After the defendant disregarded a restriction, but before action by the plaintiff's lessor, the plaintiff sought a mandatory injunction to have the premises restored. *Held*, that the plaintiff is not entitled to relief. *Harris v. Boots, etc., Co. Ltd.*, [1904] 2 Ch. 376.

The plaintiff's lessor could have proceeded against either the plaintiff or the defendant on the covenants, or against the defendant in equity. *Tulk v. Moxhay*, 2 Ph. 774. But as between the plaintiff and the defendant, the defendant should bear the ultimate burden, because he alone has the benefit and control of the land and he alone commits the breach. The plaintiff is, therefore, entitled to enforce the defendant's covenant to the extent of indemnity or exoneration. But this right did not arise in the principal case because he needed no assistance, for his liability had not been fixed by any act of his lessor. See *Randlaugh v. Hayes*, 1 Vern. 189. Has the plaintiff, then, any right on the covenant independent of indemnity? No other case has been found, but the negative answer of the court seems correct. See *In re Poole and Clarke's Contract*, [1904] 2 Ch. 173. He has parted with all interest in the land; derives no benefit from the restrictions; suffers no loss from the breach. He resembles in this a warrantor of title to realty, whose right to sue previous warrantors is restricted to indemnity. *Booth v. Starr*, 1 Conn. 244.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY—IMPLIED RIGHT OF COVENANTOR TO SIMILAR COVENANTS FROM HIS PURCHASER.—On a statutory summons under a contract for the sale of land subject to restrictive covenants, the question was whether the purchaser was bound to covenant to perform the covenants and to indemnify his vendor against breaches of them, as the vendor had covenanted with his grantor. *Held*, that the purchaser must so covenant but for no purpose other than strict indemnity. *In re Poole and Clarke's Contract*, [1904] 2 Ch. 173.

This obligation can be imposed only by finding it in the contract of the parties. It is not expressed, but, in the light of the circumstances, it may perhaps be fairly implied. *Moxhay v. Inderwick*, 1 De G. & Sm. 708. The parties know that each is bound to the previous owner; that the vendor, after the sale, loses all personal interest in the restrictions; and that ultimately the defendant should bear the burden, since he alone uses and controls the land and commits the breach. This brings the case within the rule of some English text-writers, applied to the sale of land subject to mortgage, that whenever the vendor is personally subject to liabilities in respect of the estate or for the performance of which the estate is security, his purchaser must undertake the liabilities and covenant to indemnify the vendor against them. See 1 DART, VENDORS AND PURCHASERS, 6th ed., 628; *Adair v. Carden*, 29 L. R. Ir. 469. In the United States, where the vendee rarely executes the deed, it would be much more difficult to imply such an obligation on the vendee as the principal case imposes. No case on the point has been found. *Cf. Fiske v. Tolman*, 124 Mass. 254.

SALES—WARRANTY—REMEDY FOR BREACH OF WARRANTY OF TITLE.—The defendant sold personal property to the plaintiff, agreeing to furnish a good title. The latter, while still in the undisturbed possession of the property, sued for breach of this covenant of title. *Held*, that the plaintiff cannot recover substantial damages without showing she has been disturbed in her possession or otherwise injured by such defect of title. *Barnum v. Cochrane*, 77 Pac. Rep. 656 (Cal.).

The question when a warranty of title is so broken as to give a cause of action is in square conflict, but the view taken by the court, that the vendee can sue only after he has been dispossessed or otherwise injured, is supported by the weight of authority. *McGiffin v. Baird*, 62 N. Y. 329. Some courts, however, uphold the other position that the vendee is entitled to sue at once. *Grose v. Hennessey*, 13 Allen (Mass.) 389. The former view seems the better on principle, as under the latter a vendee might recover full damages at once for failure of title when, if never dispossessed, his damage would be only nominal. Furthermore under this latter theory the vendee might be barred by the statute of limitations, although he were unaware of any defect in his title until his remedy was lost. The present decision requiring actual dispossession follows the analogy in the law of real property that a covenant of warranty is not broken until there has been an actual ouster. *Gilman v. Haven*, 11 Cush. (Mass.) 330.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE WITHOUT A CHANGE OF POSSESSION.—The plaintiff built a house on his land in reliance on the oral promise of the defendant to buy the land when the house was completed. The defendant having refused to carry out his agreement the plaintiff brought a bill for specific performance. *Held*, that the plaintiff is entitled to a decree. *Dickinson v. Barrow*, [1904] 2 Ch. 339. See NOTES, p. 137.

TORTS—LIABILITY FOR ACT OF AGENT—LESSOR AND LESSEE RAILROADS.—The appellee, a switchman in the employ of a company operating the line of the defendant railroad under a lease, was injured in the course of his duty through the negligence of the lessee in furnishing defective appliances. Suit was brought against the lessor railroad. *Held*, that the defendant is liable. *Chicago, etc., Ry. Co. v. Hart*, 209 Ill. 414.

The lessor railroad has often been held liable, in the absence of statutory exemptions, for torts against the public due to the negligent operation of its line by the lessee. *Singleton v. Southwestern R. R. Co.*, 70 Ga. 464. The basis of such decisions is the requirement, founded on public policy, that the common carrier be held to the proper exercise of its chartered powers and obligations with respect to the public, considering the lessee the agent of the lessor in the discharge of those duties. Between the lessee's servant and the lessor no interdependent relation such as exists between the public and the lessor is established either by charter or by voluntary contract. Consequently most courts rightly regard the lessee as an independent contractor with the employee, and refuse to charge the lessor with the employer's negligence toward him. *East Line, etc., Ry. Co. v. Culberson*, 72 Tex. 375. The principal case seems to find support only in North Carolina. *Logan v. North Carolina R. R. Co.*, 116 N. C. 940.

But for injuries resulting from defects in the roadbed, stations, and premises leased, the lessor is quite generally responsible to employees and to the public alike. *Lee v. Southern, etc., R. R. Co.*, 116 Cal. 97.

TORTS—PERSONAL RIGHTS—LIABILITY OF PROPRIETOR OF PUBLIC RESORT FOR INSULT TO GUESTS.—The defendant owned and maintained a park used as a place of public resort. One of its servants mistook the plaintiff for a woman of ill repute, and requested her to leave. No publication of defamatory matter was charged, and the employee, as well as the defendant's manager, apologized almost immediately. *Held*, that every person not a member of a proscribed class, has a right to be free from insult and personal indignities in a public resort, and that the plaintiff may recover for the mental humiliation which she suffered. *Davis v. Tacoma, etc., Co.*, 77 Pac. Rep. 209 (Wash.).

No court has gone so far as to recognize a general right to be free from insults causing only mental suffering. See *Reed v. Maley*, 74 S. W. Rep. 1079 (Ky.); *Prince v. Ridge*, 66 N. Y. Supp. 454. The establishment of such a right would render useless the limitations of the law of libel and slander, and open wide the door to fraudulent litigation. The Washington case must be regarded as an attempt to extend the liability of the owner of property toward invited persons. The most that a host has been held for hitherto is physical injury to guests from the dangerous condition of the premises; and to enlarge his responsibility as suggested would make his position unduly difficult. Furthermore, it would seem for the public good that the proprietors of public resorts should not be held to act at their peril in ejecting obnoxious persons. The responsibility of railroads for insults to passengers by employees does not furnish a conclusive argument by analogy, for the rule in those cases is founded on the peculiar law of carriers, a class within which street railway parks do not fall. See *Purcell v. Daly*, 19 Abb. New Cas. 301; *Gillespie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347.

TRIALS—APPEAL—RIGHT TO REVIEW FACTS IN ELECTION CONTESTS.—In a suit brought to contest the defendant's election, the trial judge found for the defendant. An appeal was taken on the ground that the decision of the trial judge as to matters of fact was erroneous. *Held*, that the judgment be reversed. *Shields v. McMahan*, 81 S. W. Rep. 597 (Tenn.).

In reviewing the findings of fact, the appellate court merely applied the rule that obtains in equity appeals. *Cf. French v. Gibbs*, 105 Ill. 523. Generally, however, in election contests, the decision of the judge on findings of fact, like the verdict of a jury, is not subject to review. *Jones v. Glidewell*, 53 Ark. 161. And at law, cases in which a judge has by consent of the parties tried the facts, are treated in the same way. *Case, etc., Co. v. Soznan*, 138 U. S. 431. In refusing to follow these authorities, the court bases its decision upon the consideration that in election contests the judge is required by law to try the facts, and traces an analogy to equity procedure. The analogy appears to be real and affords strong support to the case. The result may also be defended on the ground that by withdrawing the ultimate determination of the issue as far as possible from the influence of local politics, it tends to decrease the danger, especially great in these cases, of a prejudiced decision. But it may be questioned whether these reasons justify the court in deciding against the weight of authority.

WILLS—CONSTRUCTION—PROVISION AGAINST CONTEST.—The testatrix, by a will containing a provision that any legatee contesting it should forfeit his legacy, made a bequest to the appellee. The latter unsuccessfully contested the probate of the will. *Held*, that as the legatee had reasonable cause for contesting the will, he is not barred by the forfeiture clause. *In re Friend's Estate*, 58 Atl. Rep. 853 (Pa.).

Although the point raised by this case is in some conflict, the result reached seems eminently desirable. Against the case it may be urged that it apparently violates the express wishes of the testatrix. But to decree an absolute forfeiture in every case would work injustice. If a legatee reasonably believes that a will was procured by undue influence, he ought not to be forced to contest it at his peril. Furthermore if, reasonably thinking that a part of the will was inserted by mistake without the testator's knowledge, or that it is a forgery and so not entitled to probate, he contests it on that ground, he should not be deprived of his legacy. To enforce the forfeiture in such cases would frequently have no other effect than to aid dishonest persons in reaping the benefit of their wrong. On the other hand, the rule holding a forfeiture clause operative only where the contestant has not probable cause for his suit, would still discourage the bringing of vexatious suits, which, after all, is ordinarily the real purpose of the testator. *Cf. Jackson v. Westerfield*, 61 How. Pr. (N. Y.) 399.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

EMPLOYER'S LIABILITY INSURANCE AND RIGHTS OF EMPLOYEES. — A recent writer treats some questions raised by the now very common employer's liability insurance: *Liability of Insurers and Rights of Employees under Employer's Liability Insurance Policies*, by Henry M. Dowling, 59 Cent. L. J. 5 (July 1). The situation presented when an employer with one of these policies goes into bankruptcy is interesting. In such a case the insurance company is liable if an injured employee has secured a judgment, even if the policy be one of indemnity against actual loss, for there has been a loss to the employer by the surrender for the benefit of creditors, of whom the employee is one. The amount of the insurer's liability will be a percentage of the employee's claim corresponding to the percentage the other assets will pay the other creditors, and he will be treated exactly like all the rest. *Traveler's Ins. Co. v. Moses*, 63 N. J. Eq. 260.

In the case of a policy of "indemnity against liability" the insurer will have to pay the full amount of the claim of the employee. What are his rights against the fund so produced? If he is to share in it as an asset, the other creditors will really be better off because of his misfortune. That is not the case with a policy against actual loss, and at first blush seems wrong. Why should not the injured man claim against the insurer directly, taking the full proceeds of the policy, which will be the amount of his claim? The asset seems a result of his injury. Mr. Dowling says: "This last result would be legally unobjectionable if it could properly be said that the contract was entered into for the benefit of the employee In that case the employee would stand on the footing of a secured creditor and it would not lie in the mouth of any other claimant to object to the employee forcing the principal to pay his just obligation, especially as thereby the assets of the insolvent master (the surety) would be exonerated. *Beacon Lamp Co. v. Traveler's Co.*, 61 N. J. Eq. 59. The fatal weakness of this position is, that as between the insurer and the insured the employee is unknown. He may not be in the master's employ when the policy is executed; he is not the person intended directly to be benefited, for there is no duty resting upon the master under the usual insurance contract to pay the employee out of the funds realized from the policy. The moneys paid over to the employer by the insured do not constitute a trust fund for the servant's benefit, *Bain v. Atkins*, 181 Mass. 240, but are the absolute property of the employer to be disposed of as he pleases." Such moneys paid to an employer are not assets in his hands for the benefit of the employee's estate. *Hawkins v. McCalla*, 95 Ga. 192. And even where a beneficiary may sue upon a contract, and the policy provides that payment shall be made to the assured for the benefit of the injured person, the employee cannot recover directly from the insurance company because of lack of privity. *Embler v. Hartford Co.*, 158 N. Y. 43.

Mr. Dowling might have supported his argument that the workman should share with the other creditors, by the law in regard to contracts of reinsurance, which are held to be contracts of indemnity against liability. The reinsurer must pay the reinsured the actual amount of the claim against the latter. *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137. But a fund so produced, forming assets of an insolvent insurance company, is distributable *pro rata* to all creditors, the original insured getting no preference. *Goodrich and Hick's Appeal*, 109 Pa. St. 523. *Herckenrath v. Am. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63. The similarity of these cases to those brought up by Mr. Dowling is clear.

THE RESPONSIVE ANSWER IN EQUITY CONSIDERED AS EVIDENCE FOR THE DEFENDANT. — That the responsive answer of the defendant, under oath, is conclusive, unless contradicted by two witnesses or by one witness and circumstances as corroborative as the testimony of another witness, is a rule of equity well established by American authority. The fact that this forces the plaintiff not only to maintain the allegations of his bill but also to overcome the positive responsive averments of the answer by testimony equivalent to that of two witnesses gives the defendant an obvious advantage. So unjust has this advantage seemed, that the eminent Pennsylvania lawyer, John Marshal Gest, has been led in a recent article to investigate the origin, history, and scope of the rule and to urge the advisability of its abolition. *The Responsive Answer in Equity Considered as Evidence for the Defendant*, 52 Am. L. Reg. 537. The understanding of this rule necessitates the consideration of two others, the two-witness rule and the rule excluding the testimony of parties. The history of each of these is very properly but somewhat elaborately traced by the learned writer. He finds that the former rule existed in both the canon and civil law at the time the Chancery rules were being formulated, and that from these systems of law it was adopted by Equity. But although the latter rule was at the same time in operation in the courts of law, it was not made a part of equity practice, since its effect would have been to limit the power of the Chancellor in obtaining evidence for the enlightenment of his conscience. From the first, then, the defendant in equity, though a party, was compelled to answer under oath. It was not until later, however, that any part of this answer came to be regarded as evidence in the defendant's favor. The English authorities never went much farther than to consider only that part of the answer which was a denial of the bill as evidence for the defendant, which is but saying that the plaintiff must establish his allegations by more than one witness. But in America even positive averments in the answer which are responsive are considered as evidence for the defendant. The American doctrine was rested on the theory that, since the defendant could be compelled in this extraordinary manner to answer under oath, his answer should be considered as evidence for himself as well as for the plaintiff. For the reason, then, that it was evidence under oath, the plaintiff, having the burden of proof, could not, under the two-witness rule, rebut it by one oath alone. To-day, however, the answer of the defendant under oath is not extraordinary relief, for the rule excluding the testimony of parties has been abolished. Mr. Gest urges that since the existence of that rule was one of the main reasons for the origin and continuance of the equity rule, the latter should be abolished also. He suggests too that the weight of testimony can be more accurately determined by a consideration of the character of the witness than by depending upon preponderance in the number of witnesses. After following Mr. Gest's arguments one is not surprised to learn that the rule has been abolished in many American jurisdictions.

EFFECT OF MISTAKE UPON CONTRACTS. — An attempt has been made in a recent article to define the principles underlying the law on this subject, and to show how a failure to clearly recognize them has led to confusion among the authorities. *A Critical Analysis of the Law as to Mistake in its Effect upon Contracts*, Anon., 38 Am. L. Rev. 334 (May-June, 1904). The writer by a careful and searching analysis of the cases points out that the granting of relief against mistake rests upon two totally different theories. In the first class he places those cases in which, owing to a mistake of one party as to the contract itself, there has been no real meeting of the minds, and hence no valid contract. Cf. *Raffles v. Wichelhaus*, 2 H. & C. 906. Here the mistaken party must show that his mistake was reasonable; otherwise he is estopped from alleging it. Under the second class are included those cases where an actual meeting of the minds has been brought about by mistake as to some supposed fact. Here, not only must the mistake be common to both parties in order to avoid, but also it must be in regard to a fact so evidently within their contem-

plation that its turning out to be untrue amounts to a failure of consideration. The difficulty is to determine when the mistake is of this character. When it is so, the contract is voidable. The most common example is a mistake in regard to the quality of the thing sold; as, where one buys from another a bar of metal, both parties supposing it to be gold, and it turns out to be brass. There the buyer may rescind. Mistake as to some collateral fact, not of quality, may be said generally not to affect the contract; as, for example, those sales of land or chattels where it is within the contemplation of the parties that whatever speculative value the property may have shall belong to the vendee. Furthermore, such mutual mistake must be one of fact, not of law, except in two cases where equity grants relief: the first, where the mistake is one as to title or other matter of private right; the second, where the instrument fails to express the intention of the parties. As the writer notes, much of the conflict among the authorities and text writers upon this subject is probably due to a failure to distinguish these two separate principles, the tendency being to regard all mistakes as rendering the contract void. That contracts of the second sort should be void seems contrary to fundamental principles. The minds of the parties have met and consideration has been furnished by both. The fact that there has been a material failure of consideration does not negative the existence of the contract, but merely renders it voidable.

THE CY PRES DOCTRINE AND THE RULE AGAINST PERPETUITIES. — When one well-established principle of law comes in conflict with another, the amount of modification, if any, which occurs in each is always an interesting question. When these conflicting principles are the *cy pres* doctrine and the rule against perpetuities the question becomes, in addition, one of some intricacy. Mr. James Quarles in a recent article discusses this question. *The Cy Pres Doctrine, in Reference to the Rule against Perpetuities — An Advocacy of its Adoption in all Jurisdictions*, 38 Am. L. Rev. 683 (Sept.-Oct.). After quoting from Mr. Perry in reference to the history of the rule against perpetuities, the writer concludes that all extensions of time in the rule were made on account of reluctance to destroy the will of the grantor. He then addresses himself to the question, "Why should not all limitations which transgress the period prescribed by the rule against perpetuities, instead of being adjudged void *in toto*, be given effect for the period allowed by that rule — in short, construed *cy pres*?" In support of his contention that they should be, he quotes approvingly from the opinion of Chief Justice Doe in the case of *Edgerly v. Barker*, 66 N. H. 434. He then refers to the technical *cy pres* doctrine and asserts that the "very genius of the *cy pres* principle is that persons as well as time should be amenable to its saving operation." The decisions under the Thellusson Act governing trusts for accumulation and those under the similar Pennsylvania Act are next considered and approved. The writer concludes with a plea that the broad principle of *cy pres* should be extended. It is to be regretted that the learned writer did not consider the possibility of selecting different periods which would not transgress the rule against perpetuities. The fact that there are many permissible periods is one objection, among others, which is urged against the writer's proposition by Professor Gray in 9 HARV. L. REV. 248. Had the learned writer noticed these objections his article would have been more complete, and had he answered them the conclusion at which he arrived could be more easily sustained.

ACQUISITION DU TERRITOIRE ET LE DROIT INTERNATIONAL, L'. Ernest Nys. Discussing the various modes of acquiring territory and the legal consequences resulting. 6 Rev. de Droit Internat. 359.

ACTIONS AGAINST THE COMMONWEALTH FOR TORTS. A. P. Canaway. Discussing Australian acts and decisions. 1 Commonwealth L. Rev. 241.

- ADMISSIBILITY OF EVIDENCE TO ESTABLISH ORAL CONTEMPORANEOUS INDUCING PROMISES TO AFFECT WRITTEN INSTRUMENTS IN PENNSYLVANIA. *Stanley Fols.* 52 Am. L. Reg. 601.
- BANKERS' RIGHTS ON FORGED SIGNATURES. *Charles M. Holt.* 3 Can. L. Rev. 457. Discussing a recent Canadian case, *Ewing v. Dominion Bank.* See NOTES, p. 140.
- BLOODHOUND EVIDENCE. *Anon.* Reviewing American decisions on the admissibility of bloodhound evidence in criminal trials. 8 L. Notes (N. Y.) 364.
- CANADIAN COPYRIGHT IN ITS CONSTITUTIONAL AND LEGAL ASPECTS. I. *A. R. Clute.* Discussing the powers of the Dominion Parliament over colonial copyright, and the effect of the Imperial Act. 24 Can. L. T. 307.
- CHARGING THE DISTRIBUTIVE SHARES OF AN INTESTATE'S GRANDCHILDREN WITH A DEBT OWING TO THE INTESTATE BY THEIR PARENT WHO DIES IN THE LIFE-TIME OF THE INTESTATE. *Henry M. Dowling.* 59 Cent. L. J. 305.
- COMPENSATION IN CRIMINAL CASES. *Anon.* Discussing the provisions of the Indian Criminal Procedure Code for compensation to an acquitted defendant. 1 Crim. L. J. of India, 1, 53, 119.
- COMPOUND SETTLEMENTS. *Anon.* Discussing whether on a sale by a tenant for life (where there has been a settlement, a disentailing assurance, and a re-settlement) it is necessary to appoint trustees of the compound settlement as the only persons who can give a proper discharge for the purchase money. 26 L. Stud. J. 192.
- CONDITIONAL SALES. *D. Witherspoon.* Distinguishing conditional sales from chattel mortgages. 1 N. C. J. of L. 488.
- CRITICAL ANALYSIS OF THE LAW AS TO MISTAKE IN ITS EFFECT UPON CONTRACTS. 38 Am. L. Rev. 334. See *supra*.
- CY PRES DOCTRINE WITH REFERENCE TO THE RULE AGAINST PERPETUITIES, THE. *James Quarles.* 38 Am. L. Rev. 683. See *supra*.
- DEATH DUTIES CONSIDERED IN CONJUNCTION WITH DOMICIL AND SITUATION OF PROPERTY. *Lot Bramley.* 117 L. T. 483.
- DYING DECLARATION. *Surendra Nath Roy.* Treating particularly the law of India upon the use of dying declarations as evidence. 6 Bombay L. Rep. 177.
- EMISSION D'UN EMPRUNT AU PROFIT D'UN ETAT BELLIGERANT SUR LE TERRITOIRE D'UN ETAT NEUTRE, DE L'. *Edouard Cailleux.* Examining the rule that neutrality is not violated by subscription by private parties to a loan of a belligerent. 31 J. du Droit Internat. Privé 620.
- ENFORCEMENT OF SOUTH AFRICAN JUDGMENTS IN ENGLAND. *W. A. Burn.* 21 S. African L. J. 24.
- ESTATES UPON CONDITION. *E. E. Ledbetter.* A summary of the law on the subject. 19 Chic. L. J. 1239.
- EVIDENCE OF AN ACCOMPLICE, THE. *Mian Muhammad Shafi.* Discussing English and Indian law on the subject. 1 Crim. L. J. of India 215.
- FEUDAL TENURES OF WESTERN INDIA. 3. MARATHA JAGHIRS. *J. A. Saldanha.* 6 Bombay L. Rep. 97.
- HINDU JOINT FAMILY AND THE PRIVY COUNCIL, THE. *M. A. Tirunarayanachari.* Showing how the strict Hindu law has been modified by the decisions of British courts. 14 Madras L. J. 71, 105.
- IMPLIED WARRANTY OF AUTHORITY. *N. W. Hoyles.* Discussing the development of the doctrine. 40 Can. L. J. 685.
- INDUSTRIAL ARBITRATION AND COMMON LAW RIGHTS. *C. E. Weigall.* Commenting adversely upon a recent case under the Australian arbitration act. 1 Commonwealth L. Rev. 248.
- INNS OF COURT AND SOME OF THEIR MEMBERS, THE. *C. E. A. Bedwell.* Dealing with the early history of the institution. 1 Commonwealth L. Rev. 256.
- IS POLYGAMY PERMITTED BY THE LAWS OF ILLINOIS? *John F. Greeting.* 66 Alb. L. J. 309.
- IS THE PRESUMPTION OF INNOCENCE IN CRIMINAL CASES TO BE WEIGHED AS EVIDENCE IN THE CASE? *Robert A. Edgar.* 59 Cent. L. J. 264.
- JUDICIAL HISTORY OF INDIVIDUAL LIBERTY, THE. X. *Van Vechten Veeder.* 16 Green Bag 673.
- LIABILITY OF INSURERS AND RIGHTS OF EMPLOYEES UNDER EMPLOYER'S LIABILITY INSURANCE POLICIES. *Henry M. Dowling.* 59 Cent. L. J. 5. See *supra*.
- LIABILITY OF SAFETY DEPOSIT COMPANIES, THE. *Anon.* Calling attention to the duty of safety deposit companies to resist illegal process in behalf of their bailors. 29 Natl. Corp. Rep. 202.
- MEANING OF THE WORDS "MINES" AND "MINERALS" IN LEGAL DOCUMENTS, AND STATUTORY ENACTMENTS, AS INTERPRETED BY THE COURTS, THE. *R. B. Michell.* 14 Madras L. J. 39, 163.

- NAMES OF LITERARY COMPOSITIONS. *Bernard C. Steiner*. Discussing rights of editors and authors, with elaborate citation of cases. 16 Green Bag 643.
- PAYMENT OF EXPENSES INCURRED UNDER THE FACTORY AND WORKSHOPS ACT, 1901. Parts I. and II. *Anon.* Concerning the apportionment of such expenses between landlord and tenant. 48 Sol J. 732, 739.
- PRIVATE PROPERTY ON THE HIGH SEAS. *G. A. Finkelnburg*. History of the position of the United States upon the seizure of private property on the high seas by belligerents. 38 Am. Law Rev. 641.
- PROPOSED GOLD LAW FOR THE TRANSVAAL, THE. *George T. Morice*. Showing changes from present law. 21 S. African L. J. 123.
- QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR, SOME. VI. *Amos S. Hershey*. 16 Green Bag 659.
- RECENT RUSSIAN SEIZURES AND THE SINKING OF THE "KNIGHT COMMANDER," THE. *Blackburn Esterline*. 38 Am. L. Rev. 662.
- RESPONSIVE ANSWER IN EQUITY CONSIDERED AS EVIDENCE FOR THE DEFENDANT, THE. *John Marshall Gest*. 52 Am. L. Reg. 537. See *supra*.
- SUITS ON CONTRACTS FOR BENEFIT OF THIRD PERSONS. *M. E. E. Kerr*. 66 Alb. L. J. 312. See NOTES, p. 141.
- SWEDISH LAW REFORM. *Seymour D. Thompson*. A second article commenting on a recent work by a Swedish author. 38 Am. L. Rev. 674.
- TITLE OF BONA FIDE PURCHASERS FROM BAILEES. *Colin P. Campbell*. Stating the present rule and the theory upon which it is based. 59 Cent. L. J. 264.
- VENEZUELAN ARBITRATION ONCE MORE, THE: FACTS AND LAW. *Rudolf Dulon*. 38 Am. L. Rev. 648.
- WIDOW'S SAVINGS UNDER HINDU LAW. *P. Duraiswamy Qyengar*. 9 Bombay L. Rep. 108.

II. BOOK REVIEWS.

NOTES ON THE DOCTRINE OF RENVOI IN PRIVATE INTERNATIONAL LAW.
By John Pawley Bate. London: Stevens and Sons, Limited. 1904.
pp. 123. 8vo.

The renvoi theory is of comparatively recent origin. It has become important since the general adoption of nationality or legally authorized domicile, instead of domicile, as the criterion in questions of status, capacity, succession, and some others. At various times between 1841 and the present day the doctrine has been discussed in some of the English cases, and during the last thirty years it has been discussed in the courts on the Continent. It was not, however, until 1903 that the theory was adopted by any English court, and as there is still only a single decision and that in the lowest court, the question of the theoretical value and practical availability of this theory in English and American law is yet open to discussion, and is of timely interest.

A recent English case well illustrates an instance in which the renvoi theory is sought to be applied. A native of Malta left there in 1832, at the age of twenty-two, and took up her permanent residence in Baden, living there until her death in 1894. She died intestate as to some movable property situate in England. The question was how to distribute the property. According to the law of England, she was domiciled in Baden, but since she had not become naturalized and had not been legally authorized to take up residence, the law of Baden did not consider her there domiciled. That law provides that in the case of foreigners dying intestate, succession shall be according to the law of the country of which the foreigner is a subject at the time of his death. Three courses were open to the English court: first, to sacrifice its conception of conflict of laws to that of the law of Baden; second, to adhere to its own conception at the cost of applying the provisions of a foreign law in circumstances in which that foreign law itself would not do so; or, third, to attempt the elaboration of an entirely new branch of law designed to regulate the conflict between rules of conflict, that is, to adopt the principle of renvoi. Adopting the second of these courses, the court would have directed the property to be distributed according to Baden law. Mr. Justice Farwell, however, directed the property to be distributed among the persons entitled according to Maltese law, on one

of two grounds: first, that a domicile of choice, which is, according to the law of the country chosen, ineffectual as regards postmortuary distribution of movables, is, for this purpose, no domicile at all; or, second, assuming the deceased was domiciled in Baden, the law of Baden would, according to its terms, not apply, but would refer the question to the national law, in this case the law of Malta. Thus the court adopted either the first or the third of the courses above mentioned. *In re Johnson*, [1903] 1 Ch. 821.

This decision has not been favorably received by English or American lawyers, and Mr. Bate's pamphlet is devoted to showing that there was no foundation in English law for the decision, and that on its merits the *renvoi* doctrine cannot claim admission into the English system of conflict of laws. The pamphlet shows great care of preparation, exhaustive research in the case law of England, France, Belgium, Germany, and other countries of the Continent, and contains a scholarly tabulation, arrangement, and discussion of the decisions found, and also of the arguments advanced both by the advocates and the opponents of the *renvoi* theory. This pamphlet leads one to wish that more legal writers would give their energies to the thorough and valuable work which can be done by selecting a topic small in scope, yet interesting and important in its bearing.

CASES ILLUSTRATING THE PRINCIPLES OF THE LAW OF TORTS. By Francis R. Y. Radcliffe and J. C. Miles. Oxford: Clarendon Press. 1904. pp. xii, 628. 8vo.

This collection of cases is an "attempt to illustrate the principles underlying the main branches of the Law of Torts by a selection from the original authorities." Case-books for purposes of study have, owing to the state of legal education, hardly found a field in England. Books such as "Smith's Leading Cases" are, because of their full treatment and collection of authorities on special topics, meant for the practitioner rather than for the student. The present compilation of cases, which comes from Oxford, is, therefore, received by confirmed believers in the case-system of legal study as a gratifying indication that the value of that system is finding increasing recognition in English Universities.

The editors have, in the main, followed the method of arrangement adopted by Sir Frederick Pollock in his treatise on the subject. The aim is evidently to supplement, not supplant, the text-book. To this fact, undoubtedly, is to be attributed the presence of head-notes, for these defeat one of the chief values of the case-system, namely, to get the reader to gather his own principles from the cases. There is also, in view of the supplemental nature of the work, a natural tendency to give late authorities. But perhaps it would be better, even though it is not intended to develop the subject by successive cases, to give the great cases that mark a development in the law, *e. g.* *Pasley v. Freeman* (3 T. R. 51), and make reference merely, to later important authorities which show an advance but which lack of space crowd out.

From the American case book point of view, also, the classification is not all that it might be. To some extent this is attributable to the comprehensive scope of the selections. Cases dealing with the relation of master and servant, prescriptive rights, percolating water, and the like, might have been omitted from a collection of illustrative cases on the law of torts. Since the purpose should be to arrive at general principles, a detailed topical treatment is unnecessary. By bringing related subjects under a common head, underlying principles are better grasped and the student is not bewildered by apparent multiplicity of doctrines. Thus the cases on assault, false imprisonment, trespass to land and goods, might well form one group.

The field has been so fully covered, as far as topical treatment is concerned, that it may seem caviling to point out omissions. Yet it is surprising that there is no case on liability for nervous shocks, especially since the decision of the Privy Council in *Victorian Railways Commissioners v. Coultas* (13 App. Cas. 222) has not been followed in Ireland nor in the recent case of *Dulieu v.*

White ([1901] 2 K. B. 669). The important subject of legal cause is not adequately covered by the two cases under "Damage Caused by the Intervention of Third Party" and whatever else may be scattered in the cases under "Negligence." The selection of *Heaven v. Pender* (L. R. 11 Q. B. D. 503), with its much criticised rule by Brett, M. R., as the leading case in negligence seems unfortunate. *Thomas v. Winchester* (6 N. Y. 397), is printed as dealing with a point in the law of negligence not covered by English authority. We fail to see why *Winterbottom v. Wright* (10 M. & W. 109), and *George v. Skivington* (L. R. 5 Ex. 1), are not in point on the liability of the vendor of chattels to a third person. On the whole, however, the cases have been carefully selected, especially those on defamation, the few notes are thorough and well written, and the mechanical features of the book are excellent.

CODE REMEDIES: Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure. A Treatise Adapted to Use in all the States and Territories where that System Prevails. By John Norton Pomeroy. Fourth Edition. Revised and Enlarged by Thomas A. Bogle. Boston: Little, Brown, and Company. 1904. pp. clxx, 983. 8vo.

The candid student will admit that the old common law system of procedure had a number of technical rules, the enforcement of which often resulted in gross injustice to litigants. Far too often technicalities were the cause of costly and trying delays and even final dismissals without a determination of the merits. It is not surprising, therefore, that the suggestion of a reformed procedure, when first agitated, should have found many ardent supporters. One of the best exponents of the reform idea was John Norton Pomeroy, whose work on the subject of code remedies appeared in 1876, followed by second and third editions from his own hand in 1883 and 1894. The great enthusiasm of the author, combined with his legal ability and vigorous style, produced a very interesting and useful book.

It is believed that the author succeeded in establishing that a reformed system of procedure, eliminating most of the defects of the old system, is possible; it is only necessary to refer to the existing reformed system in England to demonstrate that it is feasible. But that uniform success has been attained in those states of this country that have legislated on the subject may be doubted. Notwithstanding the optimism of the author, a careful consideration of the differences and narrow restrictions that have resulted from judicial interpretation principally induced by common-law ideas of procedure—and these differences and restrictions may easily be found pointed out even in the discussions and citations of this work—is enough to lead the reader to the conviction that, while the author's exposition of what the reformed system should be is admirable and convincing, the actual system developed from the statutory enactments by judicial decision is deplorably disappointing. Nevertheless, in view of the existence of the reformed system of procedure in a large number of the states, a treatise as well written and as sound in its exposition as Mr. Pomeroy's book, if by reason of its completeness it recommends itself to the constant attention of the practitioner, may serve a very useful purpose in inducing a more reasonable view of code procedure; and this is a full justification for the present edition of the work.

The editor has omitted the portion of the author's introduction which dealt with historical and theoretical considerations of procedure. He has also left out occasional discussions of common law procedure which, in former editions, appeared at infrequent intervals throughout the author's text. Otherwise, with slight exception, the text, as it appeared in the author's last edition, remains intact. The editor's attention has been directed to the notes. These have been materially increased by citations of new cases and the revision of the references to statutes. In a number of instances the editor has added explanatory and illustrative notes of a helpful character. In one instance an addition, which consists in a summary and classification of cases dealing with necessary

allegations and their forms, amounts practically to a new chapter. The revision of the index makes it somewhat more extensive, while a substantial elaboration in the details of the table of contents makes it much more valuable. Another useful change is the insertion of black-lettered titles to the individual sections.

C. H. O.

NOTES TO THE SPANISH CIVIL CODE showing changes effected by American legislation, with citation of cases from Philippines Supreme Court. By Charles A. Willard. Manila: E. C. McCullough & Co., Inc. 1904. pp. xi, 106. 8vo. With which is bound a Translation of the Civil Code in force in Cuba, Porto Rico, and the Philippines. Division of Customs and Insular Affairs. War Department. Washington: Government Printing Office. 1899. pp. vi, 322. 8vo.

At the time of the occupation of the Philippines by the United States in 1898 the law in force upon the islands was derived chiefly from the Spanish Civil Code, which had been effective there since 1889. In 1901, however, the Philippine Commission enacted a Code of Civil Procedure in Civil Actions, many of the provisions of which superseded the provisions of the Spanish Code. Changes in methods of administration and in the functions of public officials, introduced by acts of Congress and by independent orders of the Philippine commissions, likewise operated to alter materially the effect of many articles of the code which were applicable originally to conditions under the Spanish domination. It is the purpose of Mr. Justice Willard's work to note the instances in which the Spanish law has thus been repealed, or modified by necessary implication. Each article of the code is taken up separately, and those which have been abrogated, or limited in effect, are commented upon. The authorities upon which the annotation is based comprise the two codes, the acts of Congress and the commissions, and the works of the Spanish commentators, Mánresa and Alcubilla. There are also frequent references to the decisions of the Philippines Supreme Court, of which Mr. Willard is a member. The statements of the author often follow manifestly from a comparison of the civil code with subsequent legislation; and where they do not, they seem to be founded on sound logic and consistent with the little authority available. The comments are concise, and the result of the discussion is stated clearly at the conclusion of each article. For convenience of reference a copy of the civil code is bound with the notes. Coming as it does from one in authority the work should prove a valuable aid in overcoming the difficulties attendant upon the practice of such a complex system of law as exists in the Philippines.

THE LAW OF TORTS: A Treatise on the Principles of Obligation Arising from Civil Wrongs in the Common Law: to Which is Added the Draft of a Code of Civil Wrongs Prepared for the Government of India. By Frederick Pollock. Seventh Edition. London: Stevens and Sons, Limited. 1904. pp. xxxviii, 679. 8vo.

The present edition of this standard text-book was called forth by the decision of the House of Lords in *Quinn v. Leatham*, just as its predecessor, the sixth edition, owed its justification to the case of *Allen v. Flood*. Practically the only changes made in the text in the last two editions have been in the section where the general principles involved in these two cases are discussed. The changes made in the law by *Quinn v. Leatham* and recent decisions of the Court of Appeal on allied topics are pointed out in the present volume with clearness. The eminent author still believes that motive is not a determining factor under the present English law, and that the element of combination has not the importance it is believed by some to possess, and was not the distinguishing feature of *Quinn v. Leatham*. He adheres to the opinion expressed in the sixth edition that "a special right not to be disturbed in one's business is not known

to the law." He suggests the following as a solution of the whole question, "that, generally speaking, persuasion and advice are free and of common right; but that, when persuasion is acted upon to the damage of a third person, such damage being intended by the persuader or a natural and probable consequence of the act, the persuader is liable to an action at the suit of the person damaged if he has either used unlawful means, such as intimidation (whether open or disguised as persuasion) or corruption, or procured a criminally punishable or fraudulent act; and that he is also liable, but subject to exception in the nature of privilege, if the act procured was a breach of contract or a merely civil wrong not involving breach of the peace or fraud."

In addition to these changes in the text the index has been revised and cases decided since the publication of the sixth edition have been added to the citations in the footnotes.

COPYRIGHT CASES. — A Summary of Leading American Decisions on the Law of Copyright and on Literary Property, from 1891 to 1903; together with the text of the United States Copyright Statute, and a Selection of Recent Copyright Decisions of the Courts of Great Britain and Canada. Compiled by Arthur S. Hamlin. New York and London: G. P. Putnam's Sons. 1904. pp. vii, 237. 8vo.

"The purpose of this compilation," as declared by the editor, "is to bring together, for convenient reference on the part of publishers, authors, and others interested in copyright property, a summary, as comprehensive as is practicable in a volume of such compass, of the issues that have arisen and the decisions that have been given under the statutes controlling copyright and literary property, since the enactment of the International Copyright Law of 1891." The scope of the collection is indicated by the title-page. All the American decisions on points of substantive law between the dates named are included, as well as the decisions of the Treasury Department upon the importation, under the copyright law, of books and works of art. Only the more important recent English and Canadian cases are included in the collection. The work of the editor has been in the main well done. The cases are abstracted with sufficient fulness for practical purposes and with great clearness. The arrangement and classification of cases are admirable and render easy the finding of any desired point settled upon authority. In some of the footnotes the editor has pointed out inconsistencies in the cases and has given his own views in connection with authorities cited. If a criticism upon the footnotes might be ventured, it is that the citation of a case included within the collection is not followed by the number of the page at which it can be found. This omission makes necessary continual reference to the index of cases. On the whole, however, the book is likely to serve well the laymen for whom it was intended and can be recommended further to the student who desires to acquire without extended study a knowledge of the present condition of copyright law.

THE UNITED STATES AND PORTO RICO, with special reference to the problems arising out of our contact with the Spanish-American civilization. By L. S. Rowe. New York: Longmans, Green, and Co. 1904. pp. xiv, 271. 8vo.

The author of this book as former chairman of the Porto Rican Code Commission writes as one having authority. The merit of his book can best be shown by giving a brief abstract of its contents. According to the "Insular Decisions" Porto Rico is not a foreign country within the language of the Dingley Tariff Bill, nor is it a part of the United States within the meaning of the Constitution. Citizens of Porto Rico are not citizens of the United States. Unhampered, then, by a number of constitutional limitations, Congress estab-

lished a civil government bearing many marks of centralization. The inexperience of the people in political affairs made it necessary to give the central government, among other things, large supervision over municipal activities, control of municipal police, control of roads and highways, and the entire management of schools. The new government at once began a series of reforms. Municipal government has been changed, an American system of taxation introduced, a plan of civil service adopted, and the entire judiciary reorganized. A new criminal code giving right of trial by jury introduces American criminal law. The commercial law, the law of divorce, of descent and distribution, and the law concerning the status of married women have been similarly changed. The object of all the reforms is to bring the public and private law of Porto Rico into harmony with that of America. The book shows with great clearness the problems presented and the progress thus far made toward their solution.

THE EXPANSION OF THE COMMON LAW. By Frederick Pollock. Boston: Little, Brown, and Company. 1904. pp. vii, 164. 8vo.

In this volume are published the series of lectures which the author delivered before several American law schools during the autumn of 1903. Under the title, "The Foundations of Justice," is shown the effect which publicity of trial before a court which acts as an umpire and against whose jurisdiction there is no official or personal privilege has had upon the development of our laws. The lecture on "The Scales of Justice" treats of the substitution of the King's Courts for the old popular courts, and explains the origin and growth of equity jurisdiction. The evolution of the power of the courts to enforce their orders is considered in the chapter on "The Sword of Justice." In the chapter entitled "The Law of Reason," which incidentally discusses the law merchant and international law, it is demonstrated that the common law has, in substance, adopted the "Law of Nature," "a living embodiment of the collective reason of civilized mankind."

As the preface points out, the work is but "a rapid survey of a wide field," and, in consequence, there is but little attempt at detail, and much knowledge of matters both of fact and of law is taken for granted. Introductory to the lectures on the expansion of the common law is a lecture entitled "The Vocation of the Common Law," in which it is argued that the destiny of the common law is to unite legally, if not politically, the United States and Great Britain. There is also an appendix giving a summary view of Anglo-Saxon law before the Norman Conquest.

A SUMMARY OF THE LAW OF PRIVATE CORPORATIONS. By Leslie J. Tompkins. New York: Baker, Voorhis & Company. 1904. pp. xxxi, 264. 8vo.

As its title indicates, this work is intended to be but an outline of the law of private corporations. It states briefly and in a systematic manner the rules of law within the scope of its subject, citing the leading cases and referring to the larger and more important treatises upon many points. In general outline the writer follows the arrangement of topics adopted by Professor Smith in his collection of cases upon this subject. The book will therefore prove of considerable service to the law student, especially in connection with the case system of study. It is just such a summary as is often found an excellent supplement to that method. For the practitioner, however, the book is too brief and general in its treatment to be of real value, except in the most incidental manner.

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- A TREATISE ON AMERICAN ADVOCACY. Based upon the Standard English Treatise, Entitled Hints on Advocacy, by Richard Harris. All new matter added being such as conforms peculiarly to American practice, thus making the work more valuable to the practitioner and student of this country than the English edition upon which it is founded, while the best features of the English book have been retained; more than one half of the present volume being new and original matter. Enlarged, completely Revised and Americanized. By Alexander H. Robbins. St. Louis: Central Law Journal Company. 1904. pp xiv, 295. 8vo.
- CASES ON RESTRAINT OF INFRINGEMENT OF INCORPOREAL RIGHTS. A Collection of Cases with Notes. By Wm. Draper Lewis. Philadelphia: International Printing Co. 1904. pp. ii, xv, 405. 8vo.
- A LETTER TO THE SHERIFFS OF BRISTOL. By Edmund Burke. Edited with an introduction and notes by James Hugh Moffatt. Philadelphia and New York: Hinds, Noble & Eldredge. 1904. pp. xxxvii, 85. 16mo.
- THE INDUSTRIAL ARBITRATION REPORTS AND RECORDS, NEW SOUTH WALES, 1904. Edited by G. C. Addison. Vol. III. Part 3. Sydney: William Applegate Gullick. 1904. pp. viii, 276, viii. 8vo.
- THE NATIONAL BANK ACT with all its amendments annotated and explained. By John M. Gould. Boston: Little, Brown, and Company. 1904. pp. xvi, 288. 8vo.
- AN OUTLINE OF THE FRENCH LAW OF EVIDENCE. By Oliver E. Bodington. London: Stevens and Sons, Limited. 1904. pp. viii, 199. 8vo.
- HANDBOOK OF THE LAW OF INSURANCE. By William Reynolds Vance. St. Paul, Minn.: West Publishing Co. 1904. pp. xiv, 683. 8vo.
- THE MONROE DOCTRINE. By T. B. Edgington. Boston: Little, Brown, and Company. 1904. pp. viii, 344. 8vo.

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DISCHARGE OF CONTRACTS BY ALTERATION.¹

II.

Material and Immaterial Alterations.

IT was laid down in Pigot's Case² that even an immaterial alteration if made by the obligee avoids a deed. But in Sanderson v. Symonds,³ the English court refused to apply the rule to a policy of insurance, and in Aldous v. Cornwell⁴ this resolution in Pigot's Case was dissented from. It has been followed in some cases in this country,⁵ but most of them were decided a number of years ago, and no such severe rule is generally in force. As has been shown, even material alterations by the obligee, when innocently made, do not bar the obligee's rights.⁶ This must be true *a*

¹ Continued from 18 HARV. L. REV. 105.

² *Ante*, p. 105.

³ 1 Brod. & Bing. 426.

⁴ L. R. 3 Q. B. 573.

⁵ Herdman v. Bratten, 2 Har. (Del.) 396; Johnson v. Bank, 2 B. Mon. 310, 311; Wickes v. Caulk, 5 Har. & J. 36; Haskell v. Champion, 30 Mo. 136; First Bank v. Fricke, 75 Mo. 178; Hord v. Taubman, 79 Mo. 101; Kelly v. Thuey, 143 Mo. 422; Bailey v. Gilman Bank, 99 Mo. App. 571; Vanauken v. Hornback, 2 Green (N. J.) 178; Wright v. Wright, 2 Halst. 175; Jones v. Crowley, 57 N. J. L. 222; Jackson v. Malin, 15 Johns. 293; Nunnery v. Cotton, 1 Hawks 222; Morris v. Vanderen, 1 Dall. 64; Crockett v. Thomason, 5 Sneed 342, 344.

⁶ *Ante*, p. 115.

fortiori of immaterial alterations. And the prevailing doctrine is that no immaterial alteration will affect rights and liabilities under a writing, irrespective of the person by whom the alteration was made or his purpose in making it.¹

The following alterations have been held material: erasing the obligee's name and substituting the name of another as obligee;² changing the name of the obligor in a deed, who in fact signed as agent but did not so indicate on the deed, to the name of the principal;³ or changing the signature of an obligor so as to make the obligation purport to be that of a corporation⁴ or firm⁵ instead of an individual, or that of an individual instead of a corporation,⁶ or that of a surety instead of a principal.⁷

¹ First Bank v. Weidenbeck, 97 Fed. Rep. 896, 897 (C. C. A.); Prim v. Hammel, 134 Ala. 652; Nichols v. Johnson, 10 Conn. 192; Reed v. Kemp, 16 Ill. 445; Ryan v. First Bank, 148 Ill. 349; Lisle v. Rogers, 18 B. Mon. 528; Tranter v. Hibbard, 108 Ky. 265; Cushing v. Field, 70 Me. 50; Moye v. Herndon, 30 Miss. 110; Burnham v. Ayer, 35 N. H. 351; Robertson v. Hay, 91 Pa. 242; Note Holders v. Funding Board, 16 Lea 46.

² Sneed v. Sabinal Co., 71 Fed. Rep. 493, 73 Fed. Rep. 925 (C. C. A.); Horst v. Wagner, 43 Ia. 373; Bell v. Mahin, 69 Ia. 408; Horn v. Newton Bank, 32 Kan. 518; Dolbier v. Norton, 17 Me. 307; Stoddard v. Penniman, 108 Mass. 366; Aldrich v. Smith, 37 Mich. 468; German Bank v. Dunn, 62 Mo. 79; Robinson v. Berryman, 22 Mo. App. 509; Erickson v. First Bank, 44 Neb. 622; Cumberland Bank v. Penniman, 1 Halst. 215; Gillette v. Smith, 18 Hun 10; Davis v. Bauer, 41 Ohio St. 257; Hoffman v. Planters' Bank, 99 Va. 480. See also Park v. Glover, 23 Tex. 469; Broughton v. Fuller, 9 Vt. 373. *Contra*, Lashaw v. Hildebeitel, 2 Penny. 257.

Changing the name of a special indorsee in a note is therefore material, Grimes v. Piersol, 25 Ind. 246, or adding a name of another person on a railroad mileage book as one entitled to ride. Holden v. Rutland R. Co., 73 Vt. 317. But changing the name of the insured in a policy from the name of the agent of a mortgagee to the name of the mortgagor, the loss being made payable, both before and after the alteration, to the mortgagee, was held immaterial since it effected no material change in the ultimate rights under the policy. Martin v. Tradesmen's Ins. Co., 101 N. Y. 498.

The addition of the word "junior" to the name of the grantee in a deed was held immaterial, as the only effect was to designate more clearly the grantee actually intended. Coit v. Starkweather, 8 Conn. 289. So the addition of "with the will annexed," after the word "administrator," Casoni v. Jerome, 58 N. Y. 315.

But otherwise of an addition of a designation, which makes the payee in effect different. Hodge v. Farmers' Bank, 7 Ind. App. 94 (cashier); First Bank v. Fricke, 75 Mo. 178 (president); York v. Janes, 43 N. J. L. 332 (collector).

³ North v. Henneberry, 44 Wis. 306. But erasure of an initial of the grantor's name in a deed is immaterial, where no change in the person is thereby intended or indicated. Banks v. Lee, 73 Ga. 25. See also Chadwick v. Eastman, 53 Me. 12.

⁴ Sheridan v. Carpenter, 61 Me. 83.

⁵ Montgomery v. Crosstwait, 90 Ala. 553 (though the alteration was made by one having no power to bind the firm); Haskell v. Champion, 30 Mo. 136.

⁶ Texas Printing Co. v. Smith, 14 S. W. Rep. 1074 (Tex. App.).

⁷ Laub v. Paine, 46 Ia. 550.

Erasing the name of a joint or prior obligor,¹ and changing the amount, time of payment, place of payment, or rate of interest are obviously material, as are the addition of words of negotiability,² or of a clause requiring payment in gold;³ a waiver of demand and notice written over a blank indorsement;⁴ the insertion of words of guaranty over such an indorsement,⁵ unless the indorser's intention was in fact to be liable as a guarantor;⁶ the addition of other property to that described in a deed or mortgage;⁷ the insertion in a mortgage of a statement that it was given to secure other debts besides that for which it was in fact given;⁸ the insertion in a bond for title of a provision that the vendee shall have immediate pos-

¹ *Smith v. United States*, 2 Wall. 219; *Gillet v. Sweat*, 6 Ill. 475; *State v. Griswold*, 32 Ind. 313; *State v. Craig*, 58 Ia. 238; *Bracken Co. v. Daum*, 80 Ky. 388; *State v. Findley*, 101 Mo. 217; *Blanton v. Commonwealth*, 91 Va. 1.

But not if the obligor whose name was erased was an infant and had repudiated his contract. *Young v. Currier*, 63 N. H. 419.

² Many authorities as to such changes in negotiable paper are collected in 1 *Ames Cas. Bills and Notes* 447, 448; 2 *Century Digest* 241 *seq.*

In *Tranter v. Hibbard*, 108 Ky. 265, a note was altered by writing the word "fixed" after the date of payment, which is equivalent to "without grace." By the law of Kentucky such negotiable paper only as is discounted at a bank is entitled to grace. The note in question never was so discounted, and the court therefore held the alteration immaterial, though admitting the note might have been discounted. The case seems wrong. The alteration purported to give the payee an added right to discount the note without entitling the maker to grace. The fact that the payee did not exercise this right cannot make any difference.

Similarly changing the penal sum in a bond. *Howe v. Peabody*, 2 Gray 556; *Board v. Gray*, 61 Minn. 242.

³ *Hanson v. Crawley*, 41 Ga. 303; *Bridges v. Winters*, 42 Miss. 135; *Foxworthy v. Colby*, 64 Neb. 216; *Church v. Howard*, 17 Hun 5; *Darwin v. Rippey*, 63 N. C. 318; *Wills v. Wilson*, 3 Oreg. 308; *Bogarth v. Breedlove*, 39 Tex. 561.

⁴ *Andrews v. Simms*, 33 Ark. 771; *Davis v. Eppler*, 38 Kan. 629; *Farmer v. Rand*, 16 Me. 453; *Schwartz v. Wilmer*, 90 Md. 136; *Harnett v. Holdrege*, 97 N. W. Rep. 443 (Neb.).

But otherwise, if the indorser is also the maker, and hence in no event entitled to demand or notice. *Gordon v. Third Bank*, 144 U. S. 97.

In *Schwartz v. Wilmer*, 90 Md. 136, the words inserted were "protest waived." The court assumed that this was equivalent to a waiver of demand and notice, and that "it converted the contingent liability of the indorser into an absolute liability." This seems wrong. Waiver of protest does not mean waiver of demand and notice. It did not even appear that the note was a foreign note, and as such entitled to protest.

⁵ *Robinson v. Reed*, 46 Ia. 219; *Belden v. Ham*, 61 Ia. 42; *Clawson v. Gustin*, 2 South. 947; *Orrick v. Colston*, 7 Gratt. 189.

⁶ *Iowa Valley Bank v. Sigstad*, 96 Ia. 491; *Levi v. Mendell*, 1 Duv. 77.

⁷ *Powell v. Pearlstine*, 43 S. C. 403; *Bowser v. Cole*, 74 Tex. 222. See also *Moelle v. Sherwood*, 148 U. S. 21; *Cf. Burnett v. McCluey*, 78 Mo. 676.

⁸ *Carlisle v. People's Bank*, 122 Ala. 446; *Johnson v. Moore*, 33 Kan. 90.

session;¹ the insertion or alteration of the date if that results in altering the legal effect of the instrument, as by changing the day of maturity;² the addition³ or cancellation⁴ of a seal after the signature of an obligor, unless a seal would in no way alter the legal effect of the document.⁵

An alteration is none the less material because the change in the contract is advantageous to the obligor. Thus where a later day of payment is substituted the obligation is avoided.⁶ So where a smaller amount is substituted in an obligation,⁷ or where the specified rate of interest is altered to a lower rate,⁸ or where the name of a joint obligor or co-surety is added,⁹ or of a prior obligor.¹⁰ The addition of a collateral guaranty does not, however,

¹ *Kelly v. Trumble*, 74 Ill. 428.

² *Hirschman v. Budd*, L. R. 8 Ex. 171; *English v. Breneman*, 5 Ark. 377; *Wyman v. Yoemans*, 84 Ill. 403; *Hamilton v. Wood*, 70 Ind. 306; *McCormick Co. v. Lauber*, 7 Kan. App. 730; *Lisle v. Rogers*, 18 B. Mon. 528; *Britton v. Dierker*, 46 Mo. 591; *McMurtrey v. Sparks*, 71 Mo. App. 126; *Bowers v. Jewell*, 2 N. H. 543; *Crawford v. West Side Bank*, 100 N. Y. 50; *Miller v. Gilleland*, 19 Pa. 119; *Taylor v. Taylor*, 12 Lea 714.

³ *State v. Smith*, 9 Houst. 143; *Morrison v. Welty*, 18 Md. 169; *Rawson v. Davidson*, 49 Mich. 607; *Fred Heim Co. v. Hazen*, 55 Mo. App. 277; *Biery v. Haines*, 5 Whart. 563; *Vaughan v. Fowler*, 14 S. C. 355.

⁴ *Porter v. Doby*, 2 Rich. Eq. 49; *Organ v. Allison*, 9 Baxt. 459; *Piercy v. Piercy*, 5 W. Va. 199.

⁵ *Truett v. Wainwright*, 9 Ill. 411.

⁶ *Wood v. Steele*, 6 Wall. 80; *Wyman v. Yoemans*, 84 Ill. 403; *Post v. Losey*, 111 Ind. 74; *McCormick Co. v. Lauber*, 7 Kan. App. 730; *First Bank v. Payne*, 19 Ky. L. Rep. 839. But see *contra*, *Union Bank v. Cook*, 2 Cranch C. C. 218.

⁷ *Prim v. Hammel*, 134 Ala. 652; *Johnston v. May*, 76 Ind. 293. See also *Doane v. Eldridge*, 16 Gray 254.

⁸ *Post v. Losey*, 111 Ind. 74; *Board v. Greenleaf*, 80 Minn. 242; *Whitmer v. Frye*, 10 Mo. 348. But see *contra*, *Burkholder v. Lapp's Ex.*, 31 Pa. 322.

⁹ *Gardner v. Walsh*, 5 E. & B. 83; *Taylor v. Johnson*, 17 Ga. 521; *Henry v. Coats*, 17 Ind. 161; *Bowers v. Briggs*, 20 Ind. 139; *Houck v. Graham*, 106 Ind. 195; *Hall's Adm. v. McHenry*, 19 Ia. 521; *Hamilton v. Hooper*, 46 Ia. 515; *Berryman v. Manker*, 56 Ia. 150; *Sullivan v. Rudisill*, 63 Ia. 158; *Shipp v. Suggett*, 9 B. Mon. 5; *Singleton v. McQuerry*, 85 Ky. 41; *Lunt v. Silver*, 5 Mo. App. 186; *Wallace v. Jewell*, 21 Ohio St. 163; *Harper v. Stroud*, 41 Tex. 367. But see *contra*, *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 590; *Gano v. Heath*, 36 Mich. 441; *Union Banking Co. v. Martin's Estate*, 113 Mich. 521; *Standard Cable Co. v. Stone*, 35 N. Y. App. Div. 62, 65.

The alteration is none the less material if the added signature is forged. *Farmers' Bank v. Myers*, 50 Mo. App. 157; *Harper v. Stroud*, 41 Tex. 367.

If the addition is without the knowledge of the obligee, it is an alteration by a stranger and hence in this country would generally have no effect. *Anderson v. Belenger*, 87 Ala. 334; *Ward v. Hackett*, 30 Minn. 150; *Standard Cable Co. v. Stone*, 35 N. Y. App. Div. 62.

¹⁰ *Haskell v. Champion*, 30 Mo. 136.

discharge the principal debtor,¹ for the addition neither increases nor diminishes his immediate liability or his ultimate equitable liability. The same is true of the erasure of the name of a collateral guarantor.²

If, however, a surety's name is added in such a way that he incurs or purports to incur at law a joint obligation with others previously bound by the instrument, the alteration seems technically a material one, though his equitable liability was one of suretyship, for the alteration if effective would create a new and different obligation at law on the part of the previous obligors. They could be sued jointly with the surety. The answer adopted in one decision³ to this reasoning is that the surety having signed after delivery of the note was not in fact a joint maker, and that as the original maker could effectively object to the joinder of the new signer the former's obligation remained unaltered. But this is unsound. An alteration to which he has not consented never binds an obligor. He is discharged not because an alteration is in legal effect wrought upon his obligation, but because it purports to be; and in the case in question the obligation of the defendant was on the face of the instrument changed to a joint obligation. Nevertheless, on account of the hardship of the case the addition has in such a case frequently been held immaterial.⁴ But there are many cases enforcing the strict rule.⁵

¹ *Ex parte Yates*, 2 De G. & J. 191; *First Bank v. Weidenbeck*, 97 Fed. Rep. 896 (C. C. A.); *Burnham v. Gosnell*, 47 Mo. App. 637; *Wallace v. Jewell*, 21 Ohio St. 163, 172; *Hutches v. J. I. Case Co.*, 35 S. W. Rep. 60 (Tex. Civ. App.). See *a fortiori* cases in note 4, *infra*. Cf. *Oneale v. Long*, 4 Cranch 60.

² *First Bank v. Weidenbeck*, 97 Fed. Rep. 896 (C. C. A.); *Broughton v. West*, 8 Ga. 248; *People v. Call*, 1 Denio 120; *Huntington v. Finch*, 3 Ohio St. 445.

³ *McCaughey v. Smith*, 27 N. Y. 39. See also *Ex parte Yates*, 2 De G. & J. 191; *Bowser v. Rendell*, 31 Ind. 128.

⁴ *Ex parte Yates*, 2 De G. & J. 191; *Mersman v. Werges*, 112 U. S. 139; *Montgomery Railroad v. Hurst*, 9 Ala. 513; *Rudolph v. Brewer*, 96 Ala. 189 (overruled); *Bowser v. Rendell*, 31 Ind. 128; *Taylor v. Acom*, 1 Ind. Ty. 436; *Stone v. White*, 8 Gray 589; *Miller v. Finley*, 26 Mich. 249; *Barnes v. Van Keuren*, 31 Neb. 165; *Royse v. State Bank*, 50 Neb. 16; *McCaughey v. Smith*, 27 N. Y. 39; *Hecker v. Mahler*, 64 Ohio St. 398. See also *Ryan v. First Bank*, 148 Ill. 349; *Heath v. Blake*, 28 S. C. 406.

⁵ *Gardner v. Walsh*, 5 E. & B. 83; *First Bank v. Weidenbeck*, 81 Fed. Rep. 271 (reversed, 97 Fed. Rep. 896); *Brown v. Johnson*, 126 Ala. 93 (overruling *Montgomery R. Co. v. Hurst*, 9 Ala. 513, and, it seems, *Rudolph v. Brewer*, 96 Ala. 189); *Soaps v. Eichberg*, 42 Ill. App. 375; *Bowers v. Briggs*, 20 Ind. 139; *Nicholson v. Combs*, 90 Ind. 515; *Dickerman v. Miner*, 43 Ia. 508; *Hamilton v. Hooper*, 46 Ia. 515; *Sullivan v. Rudisill*, 63 Ia. 158; *Browning v. Gosnell*, 91 Ia. 448; *Rhoades v. Leach*, 93 Ia. 337; *Shipp v. Suggett*, 9 B. Mon. 5; *Singleton v. McQuerry*, 85 Ky. 41; *Lunt*

In two cases¹ where the name added created or purported to create a several liability on the part of the new signer the previous signer was held not discharged because no joint liability was created. The terms of the legal obligation of the previous signer are certainly not affected by such an addition, but if the consequence of carrying out the obligation assumed by the new signer is that equitably the latter must pay equally with the previous signer, the contract is certainly altered by the added signature. Such is the situation where the new signer is a co-surety. If, however, the only previous signer is the principal debtor, the contract is not altered, for he remains liable immediately at law and ultimately in equity for the whole.

The following changes have been held immaterial: the alteration of the name of the grantee² or grantor³ or other party⁴ by correcting a mistake in spelling or initials, where no change in the person designated is intended or apparently indicated; the insertion of a more specific description of the mortgaged property in a chattel mortgage;⁵ the addition in a bond to pay a judgment of a provision for payment of legal costs, since that was the effect of the bond originally;⁶ the insertion or alteration of the date when that does not alter the legal effect of the instrument by changing the day of maturity or otherwise;⁷ the insertion of the name of the obligor in the body of a bond, after the execution of the bond,⁸ since the obligor would be liable though his name had not been inserted; the alteration of the courses named in a

v. Silver, 5 Mo. App. 186; *Farmers' Bank v. Myers*, 50 Mo. App. 157; *Allen v. Dornan*, 57 Mo. App. 288; *Wright v. Kelley*, 4 Lans. 57; *Harper v. Stroud*, 41 Tex. 367; *Ford v. Cameron Bank*, 34 S. W. Rep. 684 (Tex. Civ. App.).

¹ *Collins v. Prosser*, 1 B. & C. 682; *Brownell v. Winnie*, 29 N. Y. 400.

² *State v. Dean*, 40 Mo. 464; *Cole v. Hills*, 44 N. H. 227; *Derby v. Thrall*, 44 Vt. 413.

³ *Banks v. Lee*, 73 Ga. 25.

⁴ *Re Howgate & Osborn's Contract*, [1902] 1 Ch. 451.

⁵ *Starr v. Blatner*, 76 Ia. 356; *Chicago Trust Co. v. O'Marr*, 18 Mont. 568. See also *Heman v. Gilliam*, 171 Mo. 258; *Gunter v. Addy*, 58 S. C. 178. But see *contra*, *McKinney v. Cobell*, 24 Ind. App. 676, which went on the ground that the more specific description would charge third persons with notice. See further s. c., 31 Ind. App. 548.

⁶ *Kleeb v. Bard*, 12 Wash. 140.

⁷ *Parry v. Nicholson*, 13 M. & W. 778; *Gill v. Hopkins*, 19 Ill. App. 74; *Lee v. Lee*, 83 Ia. 565; *Prather v. Zulauf*, 38 Ind. 155; *Terry v. Hazlewood*, 1 Duv. 104; *State v. Miller*, 3 Gill 335; *Hepler v. Mt. Carmel Bank*, 97 Pa. 420; *Whiting v. Daniel*, 1 Hen. & M. 391; *Bashaw's Adm. v. Wallace's Adm.*, 45 S. E. 290 (Va.). But see *Bills of Ex. Act*, § 64 (2); *Crawford, Neg. Inst. L.* § 206.

⁸ *Smith v. Crooker*, 5 Mass. 538.

deed where the alteration was required by the context and was in accordance with the facts;¹ the insertion of a recital of unessential circumstances;² the addition³ or cancellation⁴ of words of description, or the addition of a place of residence,⁵ after the signature of an obligor; the erasure of the name of a surety, so far as the principal debtor is concerned;⁶ the addition of a memorandum, which does not purport to form part of the document itself.⁷ Under this last rule the addition or alteration of the figures indicating the amount of a bill or note is immaterial, if the body of the writing clearly states the amount,⁸ for the figures are rather a memorandum than an integral part of the obligation. But if a memorandum collateral in form is in fact a part of the contract, the erasure of the memorandum is a material alteration.⁹

¹ *Burnham v. Ayer*, 35 N. H. 351.

² *Rudesill v. County Court*, 85 Ill. 446.

³ *Manufacturers' Bank v. Follett*, 11 R. I. 92 (agent).

⁴ *Burlingame v. Brewster*, 79 Ill. 515; *Marx v. Luling Assoc.*, 17 Tex. Civ. App. 408.

⁵ *Struthers v. Kendall*, 41 Pa. 214. *Cf.* *Commercial Bank v. Patterson*, 2 Cranch. C. C. 346.

⁶ *Lynch v. Hicks*, 80 Ga. 200; *Loque v. Smith*, *Wright* (Ohio) 10; *Tutt v. Thornton*, 57 Tex. 35.

⁷ *Manning v. Maroney*, 87 Ala. 563; *Maness v. Henry*, 96 Ala. 454; *Mente v. Townsend*, 68 Ark. 391; *Carr v. Welch*, 46 Ill. 88; *Huff v. Cole*, 45 Ind. 300; *Toner v. Wagner*, 158 Ind. 447; *Light v. Killinger*, 16 Ind. App. 102; *Reed v. Culp*, 63 Kan. 595; *Nugent v. Delhomme*, 2 Mart. (O. S.) 308; *Littlefield v. Coombs*, 71 Me. 110; *Cole's Lessee v. Pennington*, 33 Md. 476; *Cambridge Bank v. Hyde*, 131 Mass. 77; *Boutelle v. Carpenter*, 182 Mass. 417; *American Bank v. Bangs*, 42 Mo. 450; *Moore v. Macon Bank*, 22 Mo. App. 684; *Johnson v. Parker*, 86 Mo. App. 660; *Palmer v. Largent*, 5 Neb. 223; *Edward Thompson Co. v. Baldwin*, 62 Neb. 530. *Kinard v. Glenn*, 29 S. C. 590; *Yost v. Watertown Steam Engine Co.*, 24 S. W. Rep. 657 (Tex., Civ. App.); *Tremper v. Hemphill*, 8 Leigh 623. See also *Sawyer v. Campbell*, 107 Ia. 397; *Steeley's Credr's v. Steeley*, 23 Ky. L. Rep. 996. *Cf.* *Warrington v. Early*, 2 E. & B. 763; *Woodworth v. Bank of America*, 19 Johns. 391.

⁸ *Horton v. Horton's Est.*, 71 Ia. 448; *Woodfolk v. Bank of America*, 10 Bush 504; *Fisk v. McNeal*, 23 Neb. 726; *Smith v. Smith*, 1 R. I. 398.

In *Schryver v. Hawkes*, 22 Ohio St. 308, a *bona fide* purchaser was allowed to recover on a note where the figures had been raised, though the amount was left blank in the body of the note and the figures had been written by the defendant in order to limit the amount for which the blank space for the amount could be filled in.

⁹ *Cochran v. Nebeker*, 48 Ind. 459; *Scofield v. Ford*, 56 Ia. 370; *Johnson v. Heagan*, 23 Me. 329; *Wheelock v. Freeman*, 13 Pick. 165; *Wait v. Pomeroy*, 20 Mich. 425; *Bay v. Shrader*, 50 Miss. 326; *Davis v. Henry*, 13 Neb. 497; *Gerrish v. Glines*, 56 N. H. 9; *Price v. Tallman, Cox* (N. J.) 447; *Benedict v. Cowden*, 49 N. Y. 396; *Stephens v. Davis*, 85 Tenn. 271. See also *Law v. Crawford*, 67 Mo. App. 150. *Cf.* *Theopold v. Deike*, 76 Minn. 121; *Law v. Blomberg*, 91 N. W. Rep. 206 (Neb.). *Hubbard v. Williamson*, 5 Ired. 397. But if a condition qualifying the liability of the maker of a note is written with a pencil and the condition is afterwards erased, the

Alteration by adding or changing a statement of the consideration does not ordinarily change the legal effect of an obligation, and if that is the correct test, as is generally held, in the American decisions,¹ such an alteration is immaterial.² But a statement of consideration may be important as evidence of the terms of a transaction, and if added or erased fraudulently should make the writing inadmissible as evidence upon that question at least.³ If the writing was the sole legal evidence by which the debt could be proved, the alteration would then be fatal to any recovery by the plaintiff; otherwise not.⁴ The same may be said in regard to an alteration of the number of a bond or bank note;⁵ or of

maker has been held liable, because of his negligence, to a *bona fide* purchaser without notice on the note in its altered form. *Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257. This principle has been carried so far in some cases as to hold the maker liable when a condition written below the note has been cut off. *Noll v. Smith*, 64 Ind. 511; *Phelan v. Moss*, 67 Pa. 59; *Zimmerman v. Rote*, 75 Pa. 188. These decisions are on their facts opposed to several of the cases cited above. *Cf. Brown v. Reed*, 79 Pa. 370.

¹ See the American cases here cited on materiality and immateriality. So in *Caldwell v. Parker*, Ir. Rep. 3 Eq. 519. This decision was dissented from in *Suffell v. Bank of England*, 9 Q. B. D. 555.

² *Riggs v. St. Clair*, 1 Cranch C. C. 606; *Murray v. Klinzing*, 64 Conn. 78; *Gardiner v. Harback*, 21 Ill. 129; *Magers v. Dunlap*, 39 Ill. App. 618; *Cheek v. Nall*, 112 N. C. 370. But see *Knill v. Williams*, 10 East 431; *Wright v. Inshaw*, 1 Dowl. N. S. 802; *Suffell v. Bank of England*, 9 Q. B. D. 555, 571; *Benjamin v. McConnel*, 9 Ill. 536; *Low v. Argrove*, 30 Ga. 129. *Cf. Richardson v. Fellner*, 9 Okl. 513.

³ See *post*, p. 180. In *Suffell v. Bank of England*, 9 Q. B. D. 555, the Court of Appeal held an alteration of the number of a bank note material, though admitting the change did not alter the legal effect of the contract. In *Craighead v. McLoney*, 99 Pa. 211, it was said, "Any alteration which changes the evidence or mode of proof is material," and in *Brady v. Berwind-White Co.*, 94 Fed. Rep. 28, 106 Fed. Rep. 824 (E. D. Pa.), an addition was held material which did not change the meaning of the writing, because it would render inadmissible parol evidence of facts contradicting the inserted words. This is in accordance with earlier Pennsylvania cases holding the addition of an attesting witness material. *Foust v. Renno*, 8 Pa. 378; *Henning v. Werkheiser*, 8 Pa. 518. See also *White Sewing Machine Co. v. Saxon*, 121 Ala. 399; *International Bank v. Parker*, 88 Mo. App. 117. If this principle were logically applied it would overthrow many of the cases of immaterial alteration collected here. With the English and Pennsylvania decisions may be compared *Rowe v. Bowman*, 183 Mass. 488. In that case it was argued that the unauthorized addition of a United States Revenue stamp was a material alteration. The lack of a stamp, though it would not have made the note inadmissible in evidence in the Massachusetts courts, would have made it inadmissible in the Federal Courts. The addition therefore purported to enlarge the rights of the holder by affording evidence legal in the Federal Courts. The plaintiff nevertheless recovered.

⁴ See *post*, p. 174 *et seq.*

⁵ Such a change was held material in *Suffell v. Bank of England*, 9 Q. B. D. 555; but immaterial in *Wylie v. Missouri Pac. Ry. Co.*, 41 Fed. Rep. 623; *State v. Cobb*, 64 Ala. 127, 157; *Comm. v. Emigrant Bank*, 98 Mass. 12; *Elizabeth v. Force*, 29 N. J.

adding¹ or erasing² the name of an attesting witness, where the legal effect of the instrument is not affected by attestation, but only the mode of proof.

Whether an alteration is material is a question of law, to be decided by the court.³

Assignment of Altered Contracts.

If a contract has been made void by alteration, no subsequent assignment, even if the contract is a negotiable bill or note, can give it validity. The assignee or indorsee, though an innocent purchaser for value, has no greater rights than the previous holder.⁴ How far this rule is subject to an exception if the alteration con-

Eq. 587; *Birdsall v. Russell*, 29 N. Y. 239; *Note Holders v. Funding Board*, 16 Lea 46; *Fisk's Claim*, 11 Op. Atty. Gen. 258. Sometimes the number of a bond may affect the contract, as where bonds are paid as their numbers are drawn. See *Suffell v. Bank of England*, 9 Q. B. D. 555, 563.

¹ Held immaterial in *Hall v. Weaver*, 34 Fed. Rep. 104; *Ford v. Ford*, 17 Pick. 418; *State v. Gherkin*, 7 Ired. L. 206; *Beary v. Haines*, 4 Whart. 17; *Fuller v. Green*, 64 Wis. 159. But see *contra*, *White Sewing Machine Co. v. Saxon*, 121 Ala. 399; *Adams v. Frye*, 3 Met. 107; *Girdner v. Gibbons*, 91 Mo. App. 412; *Foust v. Renno*, 8 Pa. 378; *Henning v. Werkheiser*, 8 Pa. 518. It is material if the legal effect of the instrument would be changed thereby, as by extending the statute of limitations. *Milberry v. Stover*, 75 Me. 69; *Homer v. Wallis*, 11 Mass. 309. See also *Richardson v. Mather*, 178 Ill. 449.

² *Wickes v. Caulk*, 5 H. & J. 36. Cf. *Nunnery v. Cotton*, 1 Hawks 222.

³ *Steele v. Spencer*, 1 Pet. 552; *Payne v. Long*, 121 Ala. 385; *Overton v. Matthews*, 35 Ark. 146; *Ofenstein v. Bryan*, 20 App. D. C. 1; *Milliken v. Marlin*, 66 Ill. 13; *Cochran v. Nebeker*, 48 Ind. 459; *Heard v. Tappan*, 116 Ga. 930; *Belfast Nat. Bank v. Harriman*, 68 Me. 522; *Fisherdict v. Hutton*, 44 Neb. 122; *Burnham v. Ayer*, 35 N. H. 351; *Stephens v. Graham*, 7 S. & R. 505; *Kinard v. Glenn*, 29 S. C. 590.

⁴ *Master v. Miller*, 4 T. R. 320; *Vance v. Lowther*, 1 Ex. D. 176; *Suffell v. Bank of England*, 9 Q. B. D. 555; *Overton v. Matthews*, 35 Ark. 146; *Burwell v. Orr*, 84 Ill. 465; *Merritt v. Boyden*, 191 Ill. 136; *McCoy v. Lockwood*, 71 Ind. 319; *Eckert v. Louis*, 84 Ind. 99, 104; *Horn v. Newton Bank*, 32 Kan. 518; *Farmer v. Rand*, 14 Me. 225; *Schwartz v. Wilmer*, 90 Md. 136; *Belknap v. National Bank*, 100 Mass. 376; *Cape Ann Bank v. Burns*, 129 Mass. 596; *Hunter v. Parsons*, 22 Mich. 96; *Coles v. Yorks*, 28 Minn. 464 (mortgage); *Trigg v. Taylor*, 27 Mo. 245; *Hurlbut v. Hall*, 39 Neb. 889; *Erickson v. First Bank*, 44 Neb. 622; *Haines v. Dennett*, 11 N. H. 180; *Gettysburg Bank v. Chisholm*, 169 Pa. 564. See also *Burwell v. Orr*, 84 Ill. 465; *Pereau v. Frederic*, 17 Neb. 117; *Walla Walla Co. v. Ping*, 1 Wash. Ty. 339.

The English Bills of Exchange Act, § 64 (1), qualified this rule by the following proviso: "Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour." And the substance of this proviso has been adopted in the Negotiable Instruments Law in this country. *Crawford, Neg. Inst. L.* § 205; *Schwartz v. Wilmer*, 90 Md. 136, 143.

sisted in filling in a blank left by the obligor is a disputed question. If the instrument was incomplete and a blank in it was later filled in accordance with express or implied authority, the case is covered by what has been said of alterations made by consent.¹ If the instrument was incomplete and the obligee or another authorized to fill the blank in a certain way fills it in a different way, the case is one of an agent exceeding his actual but not his apparent authority. In such a case his principal should be liable on the instrument in its altered form to an innocent purchaser buying without notice, actual or constructive, of the excess of authority.² Where, however, the instrument was complete when issued but contained spaces which could be filled in without exciting suspicion, there is no agency. If the obligor is liable, it must be

¹ Such cases are *State v. Dean*, 40 Mo. 464; *Kinney v. Schmitt*, 12 Hun 521; *Stahl v. Berger*, 10 S. & R. 170; *Walla Walla Co. v. Ping*, 1 Wash. Ty. 339. See further, *ante*, p. 115 *et seq.*

Issuing a negotiable instrument with blanks gives any *bona fide* holder authority to fill them with appropriate words. *Michigan Bank v. Eldred*, 9 Wall. 544; *Huntington v. Bank*, 3 Ala. 186; *Visher v. Webster*, 8 Cal. 109; *Norwich Bank v. Hyde*, 13 Conn. 279; *Riddle v. Stevens*, 32 Conn. 378, 390; *Young v. Ward*, 21 Ill. 223; *Spitler v. James*, 32 Ind. 202; *Gillaspie v. Kelley*, 41 Ind. 158; *Lowden v. Schoharie Bank*, 38 Kan. 533; *Bank v. Curry*, 2 Dana 142; *Cason v. Grant County Bank*, 97 Ky. 487; *Ives v. Farmers' Bank*, 2 Allen 236; *Russell v. Langstaffe*, Doug. 514; *Scotland Bank v. O'Connel*, 23 Mo. App. 165; *Mitchell v. Culver*, 7 Cow. 336; *Redlich v. Doll*, 54 N. Y. 234; *Waggoner v. Millington*, 8 Hun 142; *Porter v. Hardy*, 10 N. Dak. 551; *Fullerton v. Sturges*, 4 Ohio St. 529; *Cox v. Alexander*, 30 Oreg. 438; *Wessell v. Glenn*, 108 Pa. 104; *Douglas v. Scott*, 8 Leigh 43. But see *contra*, *Inglish v. Brene-man*, 9 Ark. 122; *Holmes v. Trumper*, 22 Mich. 427; *Morehead v. Parkersburg Bank*, 5 W. Va. 74 (overruled in *First Bank v. Johns*, 22 W. Va. 520). See also *Young v. Baker*, 29 Ind. App. 130; *Greenfield Bank v. Stowell*, 123 Mass. 196.

This principle was applied to other contracts in *Roe v. Town Ins. Co.*, 78 Mo. App. 452; *Kinney v. Schmitt*, 12 Hun 521. Cf. *Solon v. Williamsburgh Bank*, 114 N. Y. 122.

² *Hatch v. Searles*, 2 Sm. & G. 147; *Garrard v. Lewis*, 10 Q. B. D. 30; *Michigan Bank v. Eldred*, 9 Wall. 544; *Prim v. Hammel*, 134 Ala. 652; *Overton v. Matthews*, 35 Ark. 146; *Elliott v. Levings*, 54 Ill. 214; *Spitler v. James*, 32 Ind. 202; *De Pauw v. Bank*, 126 Ind. 551, 557; *Geddes v. Blackmore*, 132 Ind. 551 (cf. *Pope v. Branch County Bank*, 23 Ind. App. 210); *Woolfolk v. Bank of America*, 10 Bush 517; *Breckenridge v. Lewis*, 84 Me. 349; *Weidman v. Symes*, 120 Mich. 657; *Simmons v. Atkinson*, 69 Miss. 862, 865; *Redlich v. Doll*, 54 N. Y. 234; *Ross v. Doland*, 29 Ohio St. 473; *Cox v. Alexander*, 30 Oreg. 438; *Wessell v. Glenn*, 108 Pa. 104; *Orrick v. Colston*, 33 Gratt. 377. But see *Riddle v. Stevens*, 32 Conn. 378; *Holmes v. Trumper*, 22 Mich. 427; *Solon v. Williamsburgh Bank*, 114 N. Y. 122; *Porter v. Hardy*, 10 N. Dak. 551.

So where a note apparently complete is delivered on the condition that another maker's name shall be obtained, the condition is invalid against an innocent purchaser. *Ward v. Hackett*, 30 Minn. 150; and see many decisions in accord in *Ames Cas. Suretyship* 305 n.

because he was so negligent in leaving spaces which invited alteration that he cannot be allowed to assert the defense of alteration against an innocent holder. In the leading case of *Young v. Grote*¹ the maker was held liable where he had carelessly left an unfilled space after the amount of a check. The case seems sound in principle and has been followed in this country.² It has, however, been practically overruled in England.³ Of course, it is only when spaces are left in such a way that the obligor must be regarded as careless in view of existing mercantile usage that the doctrine of *Young v. Grote* is applicable.⁴ It is not applicable to instruments other than negotiable paper.⁵

When a Debt Survives, though the Writing is Destroyed.

While the doctrine of alteration was applied only to obligations under seal, there was no question that if the validity of the document was destroyed by alteration, the debt represented by the document was equally destroyed, and in no form of action could the holder get relief. But with the extension of the doctrine of alteration to writings which are only evidence, and perhaps not the sole evidence, of the obligation, the technical reason for regarding the obligation as totally destroyed does not hold good, for the existence of a simple contract obligation is not in theory dependent on the evidence by which it is proved. If, therefore, in such a case the obligee is held to lose all rights, even though it would be possible to prove the obligation by legal evidence, it is because the policy requiring that the purity of written evidence shall be

¹ 4 Bing. 254.

² *Young v. Lehman*, 63 Ala. 519; *Winter v. Pool*, 104 Ala. 580; *Yocum v. Smith*, 63 Ill. 321; *Lowden v. National Bank*, 38 Kan. 533; *Blakey v. Johnson*, 13 Bush 204; *Cason v. Grant County Bank*, 97 Ky. 487; *Isnard v. Torres*, 10 La. Ann. 103; *First Bank v. Webster*, 121 Mich. 149; *Scotland County Bank v. O'Connell*, 23 Mo. App. 166; *Garrard v. Haddan*, 67 Pa. 82; *Zimmerman v. Rote*, 75 Pa. 188; *Johnson Harvester Co. v. McLean*, 57 Wis. 258, but see *Fordyce v. Kosminski*, 49 Ark. 40; *Walsh v. Hunt*, 120 Cal. 46; *Cronkhite v. Nebeker*, 81 Ind. 319; *De Pauw v. Bank of Salem*, 126 Ind. 553; *Knoxville Bank v. Clarke*, 51 Ia. 264; *First Bank v. Zeims*, 93 Ia. 140; *Burrows v. Klunk*, 70 Md. 451; *Greenfield Bank v. Stowell*, 123 Mass. 196; *Burson v. Huntington*, 21 Mich. 415; *Simmons v. Atkinson*, 69 Miss. 862; *Goodman v. Eastman*, 4 N. H. 455; *Worrall v. Gheen*, 39 Pa. 388.

³ *Scholfield v. Earl of Londesborough*, [1895] 1 Q. B. 536, [1896] A. C. 514.

⁴ See cases in note 2 *supra*, also *Harvey v. Smith*, 55 Ill. 224; *Derr v. Keaough*, 96 Ia. 397; *Bank of Billings v. Wade*, 73 Mo. App. 558; *Leas v. Walls*, 101 Pa. 57.

⁵ *Lehman v. Central Co.*, 12 Fed. Rep. 595; *Cronkhite v. Nebeker*, 81 Ind. 319; *Smith v. Holzhauer*, 67 N. J. L. 202. See also *Solon v. Williamsburgh Bank*, 114 N. Y. 122, 136.

maintained demands the imposition of a severe penalty on those who tamper with such evidence.¹

In most of the cases upon the point the altered writing was a bill of exchange or promissory note, and it has been held in England that as between the original parties the alteration does not extinguish the liability on account of which the instrument was given.² In this country the distinction has been taken between an alteration made fraudulently and an alteration not made fraudulently. In the latter case, as has been seen, the alteration in many jurisdictions will not bar recovery on the instrument itself;³ but where such recovery is barred, relief is granted by allowing recovery on the original debt or consideration for which the instrument was given.⁴ Where the instrument was given in conditional pay-

¹ Whether the rule against alteration is wider in its effect than a rule of evidence, forbidding the use of writings materially and wrongfully altered, is well illustrated by the case of a contract executed in duplicate, one part of which is thereafter fraudulently and materially altered. If the requirement of the law is merely that the altered writing shall not be given in evidence, the fraudulent party may still prove his right by the unaltered part, for each part is an original. 1 Greenl. Ev. (16th ed.) § 563. But if the fact that he has fraudulently altered a writing which embodies the contract is, as matter of substantive law, a defense there can be no recovery. The former view is supported by two decisions in regard to duplicate leases. *Lewis v. Payn*, 8 Cow. 71; *Jones v. Hoard*, 59 Ark. 42. Since a lease is primarily a conveyance, these cases may perhaps be distinguished from the case supposed. Certainly the conclusion, if applied to executory contracts, cannot be regarded as free from doubt. An affirmative plea alleging alteration of the contract would, it seems, set up a good defense and would be supported by proof of the facts. Chitty, Pleading (16th Am. ed.) 299; *post*, p. 179.

² *Atkinson v. Hawdon*, 2 A. & E. 628; *Sloman v. Cox*, 1 C. M. & R. 471. See also *Hall v. Fuller*, 5 B. & C. 750.

But there could be no recovery against a party secondarily liable on the instrument, for the consideration received by him, since the alteration has deprived him of any right to recover over against prior parties to the instrument. *Alderson v. Langdale*, 3 B. & Ad. 663.

³ See *ante*, p. 115.

⁴ *Little v. Fowler*, 1 Root 94; *Warren v. Layton*, 3 Harring. (Del.) 404; *Vogle v. Ripper*, 34 Ill. 100; *Elliott v. Blair*, 47 Ill. 342; *Hayes v. Wagner*, 89 Ill. 390; *Wallace v. Wallace*, 8 Ill. App. 69; *First Bank v. Ryan*, 31 Ill. App. 271, 38 Ill. App. 268 (aff'd 148 Ill. 349); *Hampton v. Mayes*, 3 Ind. Ty. 65; *Krause v. Meyer*, 32 Ia. 566; *Morrison v. Huggins*, 53 Ia. 76; *Eckert v. Pickel*, 59 Ia. 545; *Maguire v. Eichmeier*, 109 Ia. 301, 304; *Hervey v. Hervey*, 15 Me. 357; *Morrison v. Welty*, 18 Md. 169; *Owen v. Hall*, 70 Md. 97; *State Bank v. Shaffer*, 9 Neb. 1; *Lewis v. Schenck*, 18 N. J. Eq. 459; *Hunt v. Gray*, 35 N. J. L. 227; *Merrick v. Boury*, 4 Ohio St. 60; *Savage v. Savage*, 36 Oreg. 268; *Keene v. Weeks*, 19 R. I. 309; *Wyckoff v. Johnson*, 2 S. D. 91; *Otto v. Half*, 89 Tex. 384; *Matteson v. Ellsworth*, 33 Wis. 488. See also *Craig v. Lowe*, 36 Ga. 117; *contra* are *White v. Hass*, 32 Ala. 430; *Toomer v. Rutland*, 57 Ala. 379.

As the note, though void because of alteration, may be injurious to the defendant

ment of an antecedent debt, there is no difficulty in reaching this result. The instrument has not been paid at maturity, and the old debt therefore still exists. But the same result would probably be reached in this country, though no debt had ever existed before the transaction of which the delivery of the instrument was a part, though a recovery of the consideration or its value must in such a case be supported on principles of quasi-contract. If a material alteration is made fraudulently, however, no recovery can be had in any form of action either on the instrument or the original debt or consideration.¹

The application of these principles seems clear in the case of alteration of a mortgage note or bond. If the effect of the alteration is to discharge not simply the note or bond, but the debt itself, the mortgage, being an incident of the debt, must also fall.² If, however, the alteration was not due to fraud of the holder, the debt is not discharged, whether the altered obligation is or not; and if the debt is not discharged the mortgage will survive.³ If a mortgage is given to secure several separate obligations, such an alteration of one of them as avoids the debt represented thereby, avoids also the lien of the mortgage as to that obligation, but not as to the other obligations.⁴

Though an obligor whose obligation has been materially and fraudulently altered may thus keep the consideration which he has

if it remains outstanding, the plaintiff is required to surrender the note in order to recover on the consideration. *Morrison v. Welty*, 18 Md. 169; *Smith v. Mace*, 44 N. H. 553, 560; *Booth v. Powers*, 56 N. Y. 22, 31. Cf. *Eckert v. Pickel*, 59 Ia. 545.

¹ *Elliott v. Blair*, 47 Ill. 342; *Ballard v. Franklin Ins. Co.*, 81 Ind. 239; *Woodworth v. Anderson*, 63 Ia. 503; *Hocknell v. Sheley*, 66 Kan. 357; *Warder, etc., Co. v. Willyard*, 46 Minn. 531; *Walton Plow Co. v. Campbell*, 35 Neb. 173; *Martendale v. Follett*, 1 N. H. 95; *Smith v. Mace*, 44 N. H. 553; *Clute v. Small*, 17 Wend. 238; *Kennedy v. Crandell*, 3 Lans. 1; *Meyer v. Huneke*, 55 N. Y. 412; *Booth v. Powers*, 56 N. Y. 22. Otherwise in South Carolina. See the following note.

² *Vogle v. Ripper*, 34 Ill. 100; *Elliott v. Blair*, 47 Ill. 342; *Tate v. Fletcher*, 77 Ind. 102; *Bowman v. Mitchell*, 79 Ind. 84; *Hocknell v. Sheley*, 66 Kan. 357; *Walton Plow Co. v. Campbell*, 35 Neb. 173.

In South Carolina, even a fraudulent alteration by the holder of the note or bond will not discharge the mortgage. *Plyler v. Elliott*, 19 S. C. 264; *Smith v. Smith*, 27 S. C. 166; *Heath v. Blake*, 28 S. C. 406. See also *Bailey v. Gilman Bank*, 99 Mo. App. 571, 578.

³ *Elliott v. Blair*, 47 Ill. 342; *Clough v. Seay*, 49 Ia. 411; *Simpson v. Sheley*, 9 Kan. App. 512; *Jeffrey v. Rosenfeld*, 179 Mass. 506; *Hoffman v. Molloy*, 91 Mo. App. 367; *Bailey v. Gilman Bank*, 99 Mo. App. 571; *Gillette v. Smith*, 18 Hun 10; *Cheek v. Nall*, 112 N. C. 370.

⁴ *Parke Co. v. White River Lumber Co.*, 110 Cal. 658; *Hoffman v. Molloy*, 91 Mo. App. 367.

received without giving any equivalent for it, he would not be allowed to enforce an executory obligation, given in exchange for the altered obligation, while repudiating his own obligation on account of the alteration. He must either perform his obligation as if it had not been altered, or rescind both obligations.¹

Alteration of a Writing before Execution.

To speak of alteration as a method of discharging contracts necessarily assumes a contract at one time binding, and subsequently altered. In some cases, however, a writing is altered before it has by delivery or assent become a binding contract. This most commonly happens where a surety or joint obligor signs an obligation and entrusts it to the principal debtor or co-obligor, who alters it before delivering it to the creditor, but the same question may arise in any case where a writing is entrusted to an agent to deliver and is altered before delivery. It seems clear on principle that, however innocent the obligee may be or however innocently the alteration may have been made, so long as it is material, the obligor cannot be held.² He cannot be held on the obligation in its altered form, because he never made or assented to such an obligation. He cannot be held on the obligation in its original form, because that obligation was never delivered nor assented to by the creditor. A court may on equitable principles enforce an obligation, once valid, though technically destroyed or discharged, but it can hardly construct and enforce an obligation which never existed on the ground that the defendant was once willing to enter into such an obligation and would have done so if the writing had not been altered.³

This principle is, however, subject to a qualification. If the writing was entrusted to one with actual or apparent authority to

¹ Singleton v. McQuerry, 85 Ky. 41.

² Ellesmere Brewery Co. v. Cooper, [1896] 1 Q. B. 75; Wood v. Steele, 6 Wall. 80; State v. Churchill, 48 Ark. 426; People v. Kneeland, 31 Cal. 288; Pelton v. San Jacinto Co., 113 Cal. 21; Hill v. O'Neill, 101 Ga. 832; Mulkey v. Long, 5 Idaho, 213; Weir Plow Co. v. Walmsley, 110 Ind. 242; State v. Craig, 58 Ia. 238; Warren v. Clark, 79 Ky. 1; Waterman v. Vose, 43 Me. 504; Howe v. Peabody, 2 Gray 556; Citizens' Bank v. Richmond, 121 Mass. 110; Britton v. Dierker, 46 Mo. 591; Robinson v. Berryman, 22 Mo. App. 509; Mockler v. St. Vincent's Inst., 87 Mo. App. 473; McGavock v. Morton, 57 Neb. 385; Goodman v. Eastman, 4 N. H. 455; McGrath v. Clark, 56 N. Y. 34; Crawford v. West Side Bank, 100 N. Y. 50, 57; Cheek v. Nall, 112 N. C. 370; Jones v. Bangs, 40 Ohio St. 139; Newman v. King, 54 Ohio St. 273. See also Bracken Co. v. Daum, 80 Ky. 388; Sharpe v. Bellis, 61 Pa. 69.

³ This, however, was done in Latshaw v. Hiltbeitel, 2 Penny. 257.

make the alteration in question, the obligor will be bound by the instrument in its altered form, and the courts have gone very far in inferring such authority. Thus where a note is entrusted by a signer to one who is to borrow money upon it, and the latter without authority procures additional signatures to the note,¹ or an attesting witness,² the original signer is liable. So where a note signed in blank for accommodation and entrusted to the accommodated party is filled out by him, and later before delivery altered,³ and where a note entrusted to the accommodated party in a complete form was wrongly drawn and was altered before delivery so that it should conform to the intention of the parties;⁴ and even where names of obligors previously on the note have been erased and others substituted, the same result has been reached.⁵

Pleading and Evidence.

The pleading appropriate to enable a defendant to take advantage of alteration depends on whether the plaintiff bases his action on the obligation in its original or in its altered form. In the latter case the defendant should deny the making of the contract alleged by plea of *non est factum* or *non assumpsit* or modern equivalents.⁶ In the former case the defendant may plead affirmatively that the

¹ Hochmark v. Richler, 16 Col. 263; Governor v. Lagow, 43 Ill. 134; Geddes v. Blackmore, 132 Ind. 551; Hall's Adm. v. McHenry, 19 Ia. 521; Graham v. Rush, 73 Ia. 451; Edwards v. Mattingly, 107 Ky. 332; Brey v. Hagan, 110 Ky. 566; Evans v. Partin, 22 Ky. L. Rep. 20, 21; Ward v. Hackett, 30 Minn. 150; Babcock v. Murray, 58 Minn. 385; Standard Cable Co. v. Stone, 35 N. Y. App. Div. 62. But see *contra*, Lunt v. Silver, 5 Mo. App. 186, and *cf.* Ellesmere Co. v. Cooper, [1896] 1 Q. B. 75.

² Hall v. Weaver, 34 Fed. Rep. 110.

³ Whitmore v. Nickerson, 125 Mass. 496; Douglass v. Scott, 8 Leigh 43. But if the blanks are filled in and the note negotiated, the accommodated party cannot on subsequently recovering the note change its terms. Ofenstein v. Bryan, 20 App. D. C. 1.

⁴ Boyd v. Brotherson, 10 Wend. 93.

⁵ Jones v. Shelbyville Ins. Co., 1 Met. (Ky.) 58; Hall v. Smith, 14 Bush 604, 612; King Co. v. Ferry, 5 Wash. 536. It is submitted that this result is wrong. Even though the alteration is not apparent, there can be no ground of estoppel unless the original signer was guilty of negligence. These decisions seem opposed to State v. Churchill, 48 Ark. 426; State v. Griswold, 32 Ind. 313. See also State v. Craig, 58 Ia. 238.

⁶ Cook v. Coxwell, 2 C. M. & R. 291; Mahaiwe Bank v. Douglass, 31 Conn. 170; J. I. Case Co. v. Peterson, 51 Kan. 713; Daniel v. Daniel, Dud. (Ga.) 239; Conner v. Sharpe, 27 Ind. 41; Lincoln v. Lincoln, 12 Gray 45; Cape Ann Bank v. Burns, 129 Mass. 596; Whitmer v. Frye, 10 Mo. 348; Nat. Bank v. Nickell, 34 Mo. App. 295; Schwarz v. Oppold, 74 N. Y. 307; Farmers' Trust Co. v. Siefke, 144 N. Y. 354; Zeigler v. Sprenkle, 7 Watts & S. 175.

obligation has been altered,¹ but in this country he would also generally succeed by denying the making of the obligation, for the burden would then be on the plaintiff to prove this and on the defendant's objection to the original writing because fraudulently altered and to secondary evidence because the non-production of the original was not satisfactorily accounted for, the plaintiff would be unable to sustain this burden.² The affirmative plea is, therefore, strictly necessary only in cases in which the rule of substantive law applicable is more stringent than the rule of evidence, as in jurisdictions where an innocent material alteration is held fatal.

There are many decisions in regard to the admissibility of altered writings in evidence, and presumptions have been laid down as rules of law in a way to confuse the subject. Many courts hold that when a writing offered in evidence shows on its face an alteration, there is a presumption that the alteration was improperly made after the execution of the writing, and that, therefore, a burden is cast upon the party offering the writing to explain the alteration before the writing can be received in evidence.³ Other courts hold that in the absence of suspicious circumstances there is exactly the opposite presumption, namely, that the alteration was made innocently and legally.⁴ Nor is it always clear whether

¹ *Field v. Woods*, 7 A. & E. 114; *Davidson v. Cooper*, 11 M. & W. 778; *Croockewit v. Fletcher*, 1 H. & N. 893.

² *First Nat. Bank v. Mack*, 35 Oreg. 122, 127; *Kansas Mut. Ins. Co. v. Coalson*, 22 Tex., Civ. App. 64.

³ *Brady v. Berwind-White Co.*, 106 Fed. Rep. 824; *Warren v. Layton*, 3 Haring. (Del.) 404; *Mulkey v. Long*, 5 Idaho 213; *Mortag v. Linn*, 23 Ill. 551; *Landt v. McCullough*, 206 Ill. 214; *Dewey v. Merritt*, 106 Ill. App. 156; *Rambousek v. Supreme Council*, 119 Ia. 263; *McMicken v. Beauchamp*, 2 La. 290; *Ellison v. Mobile, etc. R. Co.*, 36 Miss. 572 (*cf.* *Jackson v. Day*, 80 Miss. 800); *Patterson v. Fagan*, 38 Mo. 70 (but see *Trimble v. Elkin*, 88 Mo. App. 229, 234); *Burton v. American Ins. Co.*, 96 Mo. App. 204; *Courcamp v. Weber*, 39 Neb. 533; *Hills v. Barnes*, 11 N. H. 395; *Burnham v. Ayres*, 35 N. H. 351; *Ames v. Manhattan Ins. Co.*, 31 N. Y. App. Div. 180, 185, *aff'd* 167 N. Y. 584; *Simpkins v. Windsor*, 21 Oreg. 382; *First Bank v. Mack*, 35 Oreg. 122; *Clark v. Eckstein*, 22 Pa. 507; *Jordan v. Stewart*, 23 Pa. 244; *Burgwin v. Bishop*, 91 Pa. 336; *Park v. Glover*, 23 Tex. 469; *Collins v. Ball*, 82 Tex. 259, 268; *Bullock v. Sprowls*, 54 S. W. 657 (Tex., Civ. App.); *Elgin v. Hall*, 82 Va. 680; *Bradley v. Dell's Lumber Co.*, 105 Wis. 245.

⁴ *Doe v. Catomore*, 16 Q. B. 745; *Little v. Herndon*, 10 Wall. 26; *Ward v. Cheney*, 117 Ala. 241; *Corcoran v. Doll*, 32 Cal. 82; *Kendrick v. Latham*, 25 Fla. 819; *Printup v. Mitchell*, 17 Ga. 558; *Bedgood v. McLain*, 89 Ga. 793; *Westmoreland v. Westmoreland*, 92 Ga. 233; *Dangel v. Levy*, 1 Idaho 722; *Stoner v. Ellis*, 6 Ind. 152; *Sirrine v. Briggs*, 31 Mich. 443; *Brand v. Johnrowe*, 60 Mich. 210; *Wilson v. Hayes*, 40 Minn. 531; *Matthews v. Coalter*, 9 Mo. 696; *Stillwell v. Patton*, 108 Mo. 352; *Adams v. Yates*, 143 Mo. 475, 481; *Holladay-Klotz Co. v. T. J. Moss Co.*, 89 Mo. App. 556;

in speaking of presumptions of one sort or another the courts mean that in the absence of any evidence showing innocence or fraud these presumptions apply, or further that there is a burden upon the party who has not the advantage of a presumption of making out his contention by a preponderance of evidence, irrespective of the pleadings.

The tendency of the best modern decisions is to disregard these rules of presumption and to treat each case upon its own facts so far as the duty of adducing further evidence is concerned, and to throw the burden of ultimate proof upon whichever party has the burden of establishing the issue raised by the pleadings.¹

Samuel Williston.

Paul v. Leeper, 98 Mo. App. 515; Dorsey v. Conrad, 49 Neb. 243; Hodge v. Scott, 95 N. W. Rep. 837 (Neb.); North River Co. v. Shrewsbury Church, 22 N. J. L. 424; Cass County v. American Bank, 9 N. Dak. 253; Franklin v. Baker, 48 Ohio St. 296; Richardson v. Fellner, 9 Okl. 513; Foley Co. v. Solomon, 9 S. Dak. 511; Farnsworth v. Sharp, 4 Sneed 55 (*cf.* Organ v. Allison, 9 Baxt. 459); Beaman v. Russell, 20 Vt. 205; Wolferman v. Bell, 6 Wash. 84; Yakima Bank v. Knipe, 6 Wash. 348; Kleeb v. Bard, 12 Wash. 140; Maldaner v. Smith, 102 Wis. 30. See also Barclift v. Treece, 77 Ala. 528; Hart v. Sharpton, 124 Ala. 638; Gwin v. Anderson, 91 Ga. 827; Gallo-way v. Bartholomew, 74 Pac. Rep. 467 (Oreg.).

In *Blewett v. Bash*, 22 Wash. 536, this presumption was held not applicable to the erasure of a signature as that must necessarily have been done after execution. See also *Burton v. American Ins. Co.*, 88 Mo. App. 392.

¹ *Rosenberg v. Jett*, 72 Fed. Rep. 90; *Harper v. Reaves*, 132 Ala. 625; *Klein v. German Bank*, 69 Ark. 140; *Hayden v. Goodnow*, 39 Conn. 164; *Baxter v. Camp*, 71 Conn. 245; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398; *Stayner v. Joyce*, 120 Ind. 99; *Hagan v. Insurance Co.*, 81 Ia. 321; *Magee v. Allison*, 94 Ia. 527; *University v. Hayes*, 114 Ia. 690; *Ely v. Ely*, 6 Gray 439; *Comstock v. Smith*, 26 Mich. 306; *Stough v. Ogden*, 49 Neb. 291; *Cole v. Hills*, 44 N. H. 227; *Hunt v. Gray*, 35 N. J. L. 227; *Hoey v. Jarman*, 39 N. J. L. 523; *Riley v. Riley*, 9 N. Dak. 580; *Robinson v. Myers*, 67 Pa. 9; *Nesbitt v. Turner*, 155 Pa. 429; *Cosgrove v. Fanebust*, 10 S. Dak. 213; *Conner v. Fleshman*, 4 W. Va. 693.

THE PRESIDENTIAL SUCCESSION ACT OF 1886.

THE Constitution of the United States, article 2, section 1, prescribes:

"The Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed, or a President shall be elected."

The Act of Congress of March 1, 1792, provided that the vacancy in the office of President, when there is no Vice-President, should be filled by the President *pro tempore* of the Senate, or, if none, by the Speaker of the House, until the election of a President by special election prescribed by the Act.

The Act of January 19, 1886, or that part which is material to this inquiry, substitutes for the President *pro tempore* of the Senate and the Speaker of the House, the Secretary of State and after him the other Cabinet officers respectively, as successors to the office of President, and abolishes the special election of President prescribed by the Act of 1792. It further provides:

"That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting."

A Committee of the House of Representatives, in reporting favorably upon the Senate bill which afterwards became the law of 1886, stated that there were certain doubts and difficulties connected with the Act of 1792 which "would disturb the succession under the present statutes, and would in all probability lead to contest over it that would disquiet the nation, unsettle business, and disturb the peace of the country."

An examination of this committee report and of the debates in Congress reveal the difficulties which it was the purpose of the

Act of 1886 to remove. Prominent among them was the question whether the President *pro tempore* of the Senate and the Speaker of the House were such officers of the United States, within the meaning of the Constitution, as could succeed to the Presidency, and, if eligible to the succession, there was added the practical difficulty that at times in our history these offices have both at the same period of time been vacant. Of equal importance was the question whether Congress has constitutional power to provide by law for an intermediate election of President; conceding Congress to have the power, there was added the difficulty that assuming the term of a President elected under an intermediate election to be four years,—and such a term was assumed in the debates,—the inauguration of future Presidents might be changed to a time other than that regularly prescribed in the Constitution, thus destroying the harmony between the co-ordinate branches of the government, and plunging its affairs into confusion.

Undoubtedly it was the intention of Congress, in enacting the law of 1886, to remove every difficulty which could have arisen under the old law. It was also generally supposed that the Act had settled all such difficulties by repealing the special election provisions of the old law and by fixing the term of the acting President for the balance of the regular unexpired term, thus continuing in power the party which had succeeded in the last election. Turning to the text-books, however, we find a lack of agreement as to what the Act has done in fact. For example, Cooley's "Principles of Constitutional Law"¹ states in a foot-note that the acting President will hold office until the next regular inauguration; Professor Hart in "Actual Government" takes the same view,² while in Andrews' "Manual of the Constitution"³ it is stated that the acting President will hold office only until a new President is elected as by the law of 1792, that is, by special election.

It is the purpose of this article to consider how the Act of 1886 has changed the old law; to examine the Constitution and the legislative proceedings, including the Act of 1886, to determine to what extent the shortcomings of the old have been solved by the new law; and finally to consider whether any further legislation or constitutional amendment is needed.

¹ Cooley, Principles of Constitutional Law 51, n. 4.

² Hart, Actual Government 265.

³ Andrews, Manual of the Constitution of the U. S. 179.

The Intent of the Framers of the Constitution. The language of the Constitution providing that the acting President shall hold office until the disability be removed or "*until a President shall be elected*" is broad enough to include either a regular or a special election; there is nothing, however, to be found in any part of the Constitution expressly providing for a special election.

In the proceedings of the Constitutional Convention, however, we find some light. The draft of the Constitution originally submitted by the Committee of Detail on August 6, 1787, contained no provision for a Vice-President, but designated the President of the Senate as successor to the Presidency in case of vacancy, and it was specifically provided that his term should continue "*until another President of the United States be chosen or until the disability of the President be removed.*" Presumably the tenure of his office was intended to be a limited one as is shown by the arrangement of the sentence, the reference to another election preceding the reference to the removal of the disability of the President.¹

On September 4 a sub-committee reported a plan for electing the President by electors and providing for an election of Vice-President by the same method. The President of the Senate was stricken out as successor to the President and the Vice-President was substituted. The phraseology as to the term of the successor was left unchanged. Thus it would seem probable that originally the Vice-President, in case at least of vacancy by removal, death, or resignation, was intended to discharge the duties of President only for a short period of time, until another President could be elected.

On September 7 the first reference in the convention to a vacancy in the office of both President and Vice-President was made. Mr. Randolph moved to add to the Committee report the following:

"The Legislature may declare by law what officer of the United States shall act as President in case of death, resignation, or inability of the President and Vice-President; and such officer shall act accordingly *until the time of electing a President shall arrive.*"

Mr. Madison objected that these latter words would prevent a supply of the vacancy by an intermediate election of the President;

¹ The report of the Committee of Detail provided that the President should hold office for seven years and should be elected by the national legislature.

and moved to substitute the words, "*until such disability be removed or a President shall be elected.*"

This motion was seconded by Mr. Gouverneur Morris and was adopted by the convention.

The Randolph motion was clearly inconsistent as to the length of term of the acting President with that of the term suggested for the Vice-President. The Madison motion brought the two terms into harmony, both being apparently intended to be temporary.

On September 12 the report of the Committee on Style changed the phraseology as to the Vice-Presidential term by striking out the same and by substituting the present language of the Constitution, — that the powers and duties of the office in case of removal, death, etc., "shall devolve on the Vice-President." This radical change in striking out the limitation of the term of the Vice-President certainly revealed an intention to have this term extend through the balance of the unexpired term; that the Vice-President serves out such unexpired term where a vacancy exists for other than disability, is, of course, not disputed. This same Committee also retained a clause to the effect that the acting President taking office because of a vacancy in the office of President and Vice-President, should hold office until "the period of choosing another President arrive."

Finally, on September 15, the draft of the Committee on Style was changed so that the term of the acting President was brought into harmony with the Madison motion of September 7.

The question as to the tenure of the acting President later arose in the Virginia convention called to ratify the Constitution. In answer to an objection by Mr. Mason that there was no provision in the Constitution for speedy election of another President, when the former is dead or removed, Mr. Madison replied:

"When the President and Vice-President die the election of another President will immediately take place; and suppose it would not, all that Congress could do would be to make an appointment between the expiration of the four years and the last election, and to continue only to such expiration. This can rarely happen."

The above proceedings make it evident that the framers of the Constitution did not intend that the acting President should necessarily serve for the balance of the unexpired term; on the contrary, they so drafted the Constitution that, as regards at least the above clause, an intermediate election of President could

be held. We may perhaps even assume that a majority of the delegates were of the opinion that a special election should be ordered in such a contingency. How far such opinion, however clearly expressed, should control in the interpretation of the Constitution remains to be considered.

The Act of March 1, 1792. The 1st Congress considered legislation to carry out the above provisions of the Constitution, and a bill passed the Senate November 30, 1791. I cannot find the text of this bill, and the House debates do not throw much light upon it. The Senate debates were not then reported.

In the 2d Congress the Act of March 1, 1792, was enacted, the provisions of which, as to the officers designated temporarily and the special election, are explained above. When this bill was passed by the House, the Secretary of State was designated as the successor to the Presidency, and Madison, then a member of Congress, voted in favor of a motion to this effect. Had it not been for the jealousy of Jefferson entertained by the Federalists, there is little doubt but that the Secretary of State would have been designated in the law as finally enacted. The Senate, however, insisted that the President *pro tempore* of the Senate and the Speaker of the House should have the succession, and when the bill came back to the House that body yielded. On its final enactment Madison voted against the bill for this reason, among others.

Later, in a letter to Edmund Pendleton, Madison attacked the law vigorously, giving as his reasons that the President *pro tempore* of the Senate and Speaker of the House were not officers in a constitutional sense; that if the framers of the Constitution had contemplated these officers as successors they would have been specifically designated in the Constitution; that these officers, or either of them, becoming acting President, would continue to remain legislative officers; that their executive functions would be incompatible with their legislative functions; or that if the executive functions were to supersede the legislative, both must fail, as the former depend upon the latter.

The debates revealed a strong desire to postpone the whole question on the ground that there was radical difference of opinion and little chance that vacancies would occur in both offices in the near future. Some members favored giving the succession to the Chief Justice of the Supreme Court; others objected to the desig-

nation of any officer originally appointed by the President on the ground that the choice of a President might thus be taken from the people and given to the Chief Executive.

It should not be forgotten that certain members of this Congress had served in the Constitutional Convention and therefore were specially well qualified to interpret the Constitution. The Act of 1792, therefore, with its provision for a speedy special election of President, must stand as a legislative interpretation of that instrument entitled to great weight.

Proceedings in Congress Leading up to the Act of 1886. The question was further considered in Congress several times prior to the passage of the Act of 1886. In 1820 the Senate passed a resolution directing the Committee on the Judiciary to report whether any and what changes were necessary in the law of 1792; the Committee reported that it was not expedient to legislate further.

In 1856 the Committee on the Judiciary reported unanimously, under a resolution of the Senate directing the Committee to consider the constitutionality of the Act of 1792, and the necessity for further legislation, that the Act was constitutional, both as to the officers designated as successors, and the provision for a special election of President. The Committee recommended, however, that should there be a vacancy existing in the office of President *pro tempore* of the Senate and Speaker of the House, the Chief Justice of the United States (provided that this officer had not presided at the impeachment of the President) should succeed, and after him the Justices of the Supreme Court respectively in the order of the dates of their commissions. No further action was taken upon this resolution.

On December 6, 1881, a resolution was introduced in the Senate directing the Judiciary Committee to inquire as to the constitutionality of the law of 1792, and whether any new legislation was necessary. There was a full debate on the question of its passage. Decisions of the Courts were cited which seemed to show that the President *pro tempore* of the Senate and the Speaker of the House were not such officers of the United States as could succeed to the Presidency. Little was said, however, as to the authority of Congress to order a special election. It was not vehemently denied, and by many conceded, that as to that point the Act of 1792 was constitutional.

On December 8, 1881, Senator Garland introduced a bill designating the Cabinet officers as successors, and providing that they should hold office for the term provided in the Constitution and the laws, or if there was no occasion under the law for an election, until the term in which the vacancy arose should expire.

In 1882 Senator Hoar of Massachusetts introduced a bill designating the Cabinet officers in place of the President *pro tempore* of the Senate and the Speaker of the House, as successors, and fixing their term expressly for the balance of the unexpired Presidential term. The special election provided by the Act of 1792 was repealed by this bill. The Senator in debate gave many reasons as to the necessity for its passage. He called attention to the confusion and trouble which might arise from the fact that the term of a President must be for four years, and that thus a President elected at a special election might be inaugurated at other than the regular four-year period; that neither the President *pro tempore* of the Senate nor the Speaker of the House could possibly perform the duties of President in addition to their regular duties, while the duties of the Secretary of State could be performed by his assistants, thus giving him time to act as President. He further pointed out that the President *pro tempore* of the Senate holds office at the will of the Senate, and that thus his removal from office might cause a vacancy in the office of acting President. As to the general propriety of the Secretary of State becoming acting President, he stated that the office of Secretary of State is usually held by one of the leaders of his party; that six former Secretaries of State had been subsequently elected President, and that out of the ninety-six years during which this Government had been in operation, the office of President had been so held during thirty-six years.

Senator Hoar's bill was referred to the Judiciary Committee, which later reported a bill substantially in accordance therewith. On January 5, 1883, the matter was again taken up for debate. Radical difference of opinion was disclosed. Some members contended that the Act of 1792 was unconstitutional, both as to the officers designated and the special election. A preponderance of opinion seemed to be that the law of 1792 was unconstitutional in its designation of the President *pro tempore* of the Senate and Speaker of the House, but that Congress had constitutional power to order a special election. There was, however, diversity of opinion as to whether it would be expedient to exercise such power.

Had the bill become law as introduced by Senator Hoar, expressly fixing the term of the acting President for the balance of the unexpired term, no question could have arisen as to the constitutional power to order a special election. During the debates, however, a motion was made and adopted to strike out that part of the bill fixing the term as above and to substitute the exact language of the Constitution, thus giving to the Acting President a term "until the disability be removed or a President shall be elected." It was also moved to strike out that part of the bill repealing the special election clause of the Act of 1792. This motion was at that time defeated and the repeal was allowed to stand. Mr. Ingalls then offered and the Senate adopted an amendment (which subsequently became part of the law of 1886) as follows:

"That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting."

Senator Ingalls, in offering his amendment, said that it was contrary to the spirit of the Constitution for the Secretary of State to serve out the balance of the unexpired term and thus to remain in office perhaps for a large fraction of the original term. Senator Sherman, also favoring the amendment, said that "it might be necessary to pass a law in an emergency to expedite an election for President so as to change existing law."

Subsequently the amendment striking out the repeal of the special election clause was offered again and was adopted, and the bill passed the Senate with both of the above amendments incorporated therein, the special election clause of the Act of 1792 being thus left in full force. These amendments entirely changed the intent of the law as introduced by Senator Hoar.

In the 48th Congress a bill similar in form passed the Senate.

In the 49th Congress a bill introduced by Senator Hoar was reported by the Committee in the form as finally enacted into law, — the Act of January 19, 1886. This bill contained a clause specifically repealing the special election provided by the Act of 1792; the term of the acting President, however, was made the

same as in the bill passed by the Senate in 1883, viz.; "until the disability be removed or a President shall be elected."

The Act of 1886 was bitterly opposed in both Senate and House. Senator Edmunds said, evidently believing that the term of the acting President was fixed for the balance of the unexpired regular term:

"It approaches in its nature to the exertion of a royal prerogative of the King in his will or in some way naming the regent who shall perform the functions of the executive office in a kingdom, during the minority of the heir apparent."

In the House of Representatives, Mr. McKinley of Ohio (the late President) moved to strike out the bill and to substitute the law of 1792 with an additional proviso that whenever a vacancy existed in the office of President *pro tempore* of the Senate or Speaker of the House, the President should convene that house in which the vacancy existed for the purpose of electing a presiding officer. Referring to the mode of filling the vacancy, he said:

"I would leave that power with the people where it properly belongs. I am opposed to any step in the opposite direction."

The late Thomas B. Reed was also recorded against the bill.

Effect of the Act of 1886. Thus far we have confined ourselves to an examination of the Constitution and a history of the legislation and proceedings under it. We must now consider how the Act of 1886 has met the difficulties which it was feared might arise under the Act of 1792. Has it obviated, in the language of the House Committee reporting it, all possible danger of disturbance to the succession under the statutes, of contest disquieting to the nation, unsettling to business and disturbing to the peace of the country?

It must be admitted that the Act, so far as relates to the constitutionality of the designation of the President *pro tempore* of the Senate and the Speaker of the House, has, by substituting the Cabinet officers, met the difficulties successfully. As regards, however, the important question, — whether Congress has constitutional power to provide for an intermediate election of President, and whether the exercise of such power is expedient, — we shall find that the difficulties have not been removed, but that, on the contrary, the doubtful questions have been left in greater uncertainty than before.

Had the Act of 1886 been enacted into law in the form as originally introduced by Senator Hoar, it would, as above stated, have avoided all constitutional questions; for if Congress has constitutional power to order a special election, it has equal power not to order one, and the designation of the term of the acting President expressly for the remainder of the unexpired term would have settled the matter.

The two amendments referred to above, however, which, first adopted in the Act introduced in 1883, finally became part of the Act of 1886, will, I fear, at some future time intensify the very dangers the Act of 1886 was designed to meet. The first of these, it will be remembered, struck out the provision fixing the term of the acting President for the balance of the unexpired term, and substituted the language of the Constitution by which the acting President holds office "until the disability be removed or a President shall be elected." When we consider that Senator Hoar's bill was intended to interpret this very language of the Constitution, it would appear that the amendment nullified this purpose and left its meaning in as great uncertainty as ever. The other amendment was that of Senator Ingalls providing that the acting President must call Congress together in special session within twenty days. Although the Act of 1886 did specifically repeal the special election provided by the Act of 1792, yet the Ingalls amendment deprived this repeal of any significance, and left the question in suspense. There can be no possible doubt as to the motive in securing this latter amendment. It was made perfectly clear, both by Senator Ingalls and Senator Sherman, as shown above, that the object was to have Congress, when called together by the acting President, consider and determine whether or not to order a special election of President.

The Act of 1886, therefore, leaves the question of the constitutionality and expediency of a special election absolutely unsettled. The acting President, under the law, must call Congress together, and that body will then decide whether it deems a special election desirable and incidentally constitutional. If it decides in the affirmative, it will frame an act which may speedily oust the acting President from office. Such an act the acting President can veto, and if vetoed, the usual two-thirds vote will be necessary to overcome the veto. Even a death-blow might be administered by a pocket veto.

It is not disputed that consequences disturbing to business and

injurious to the prosperity of the country might follow under the Act of 1792. I fear, however, that under the Act of 1886 disturbance to business and injury to the prosperity of the country are to be feared almost as acutely, if of different kind. Let us suppose, for example, that a Republican President holds office but that the Republican party is in a minority both in the House and Senate. Such a condition existed under President Hayes in the 45th and 46th Congresses, and, the parties reversed, under President Cleveland in the 54th Congress. Let us further suppose that the Democratic majority wishes to reduce customs duties; that the Republican President dies; that there is no Vice-President; that the Secretary of State succeeds as acting President; that the Democrats in Congress, believing that the people desire radical reduction of taxation, yet know that the acting President will veto a tariff reduction bill; and that they are confident that a Democratic President can be elected on this issue. Can anyone doubt that under such circumstances a bill would speedily be introduced for a special election of President? Can anyone doubt the inadvisability of permitting an acting President to decide whether or not there shall be such a special election? If the acting President were to veto such a bill, it is to be feared that the majority in Congress might tie up the whole machinery of government.

Let us take another case. Suppose that a Republican President is in office, but that the Republican party is in a minority in one house and has a very slender majority in the other. This condition happened in 1881 under President Garfield. Let us further suppose that the President and Vice-President die; that the Secretary of State succeeds to the Presidency and that he is bitterly opposed by many members of his party. Is it going too far to predict that the Democratic party might introduce a bill for a special election, knowing its ability to pass it in one house and relying upon assistance from enough members of the Republican party to carry it through the other? Is it not conceivable that the acting President might use all the patronage he controls to prevent the passage of such a bill? Is it not also possible that Congressmen (of course none in the present Congress) might couple requests for appointments of constituents with a gentle intimation that, if made, the acting President need not worry as to the fate of any bill providing for a special election?

It is hardly possible to overestimate the disturbance to the business interests of the country which might arise under such

circumstances. The office of President would be held at the will of the legislative body. The power of the executive would be merged in that of Congress. Such a condition would be in hopeless conflict with the principles of the Constitution.

Proposed Remedies. What remedy suggests itself for these defects in the Act of 1886? Should provision be made for a special election of President; or should the term of the acting President be expressly fixed by law for the balance of the unexpired term?

A careful reading of the debates in Congress, in my opinion, must give rise to some doubts as to the constitutional power of Congress to provide for a special election of President. There is not a word in the Constitution expressly granting such power; the most that can be said is that the language of the Constitution is not necessarily inconsistent with it. The proceedings in the Constitutional convention reveal, to be sure, an intention not to preclude a special election. We may go farther and concede that they reveal a desire on the part of the members that a special election of President should take place. The desire of the framers, however, seems never to have been effectuated, unless indeed there is an implied grant of power in the Constitution. The constitutional provisions fixing the term of President for four years were cited in the debates as excluding any implied grant of such power on the ground that it could not have been the intention of the framers of the Constitution to break up the system of election of President at regular four-year intervals, and his taking office concurrently with that of the members of Congress. Whether, however, the power to provide for a special election, if such power exists, would or would not carry with it power to limit the term of the President thus elected to the balance of the unexpired term, I shall not discuss.

In this connection we should not, of course, overlook the weighty authority of Madison on the constitutionality of a special election. We must remember, however, that in the Constitutional Convention Madison, by his amendment, merely removed a positive obstacle to a special election, and that in the Virginia convention he gave expression to his opinion in debate on the question of adopting or rejecting the Constitution as a whole. Nor should we forget that Madison considered the Act of 1792 unconstitutional for other reasons, and that therefore it did not become necessary to consider carefully the constitutionality of that part

relating to the special election. Certainly he has left nothing in writing or speech to show that he ever very carefully considered or more than tacitly accepted the constitutionality of a special election.

The probable intent of the framers of the Constitution, not effectuated, does not go far in constitutional construction. For example, the Constitutional Convention struck out of that instrument the power to emit bills of credit, yet the courts found in other parts an implied power to emit such bills and to make them legal tender. So also the Convention struck out the power to grant charters of incorporation. Yet it is settled law that, under certain recognized limitations, Congress, under other clauses of the Constitution, has this power. Conversely, in the present case, the framers of the Constitution, in adopting the amendment of Mr. Madison, intended to remove and did remove a positive obstacle to a special election of President; the courts, however, must find a grant of power, express or implied, in other parts of that instrument to warrant such a special election, whatever may have been the intention of the framers.

Conceding, however, that there is good ground for difference of opinion, both as to the constitutionality and expediency of a special election, it will surely be agreed that the time for its discussion should not have been postponed, as it is by the Act of 1886, until the coming together of Congress in special session at the call of the acting President. Surely, also, there is no one who would not regret the possibility of Congress being influenced in its determination of such an important question by the opinion the members may entertain of the person at the time holding the office of acting President. Such a condition, if it ever arose, might make this government one of men rather than of laws.

I have not attempted here to pass judgment upon the merits of the debates as to the length of term of the acting President. For the purpose of this article I am willing to assume that public policy demands that the Secretary of State and the other Cabinet officers respectively should be the successors for the full unexpired term. I have tried to show, however, that the Act of 1886 has not accomplished this purpose and that it has other glaring defects.

What, then, is the remedy for such defects? The American people desire above all things to have certainty with regard to the succession to the Presidency. Two courses are open. The Act

of 1886 may be amended so that the acting President shall expressly hold office for the balance of the unexpired term or until the disability be removed. Or, in the alternative, the Constitution may be amended to provide that a special election of President shall speedily be held where the offices of President and Vice-President are both vacant through other causes than disability, and that the Secretary of State and other Cabinet officers respectively shall act as President only during disability or until the inauguration of the specially elected President. To remove all possible doubt, it should also be provided that the President so elected shall hold office only for the balance of the unexpired term. The vacancy in the Presidential office could then be filled with a minimum of disturbance to the business interests of the country. The new-comer would hold office for a fixed term and would be independent of Congress, as was intended by the Constitution, whether he were designated as acting President or elected specially as President. The difficulties and doubts first arising under the Act of 1792 and rendered little less obscure and disturbing by the Act of 1886, would disappear.

It may be true that the difficulties pointed out in this article are somewhat remote and not likely to arise in the near future. They are, however, just as likely to arise as is the double vacancy, on the possibility of which the Act of 1886 depends. A fair discussion of the questions involved, therefore, would seem to be not without some useful purpose.¹

Charles S. Hamlin.

¹ Hon. Henry Cabot Lodge, United States Senator from Massachusetts, in an interesting and able article on the United States Senate, published in "Scribner's Magazine" for November, 1903, has pointed out that there is no provision in the Constitution covering the case of the death of the President-elect and the Vice-President-elect after the adjournment of the electoral college and before March 4th succeeding. This fact would seem to furnish another cogent reason for a re-examination of the whole question by Congress.

POSSESSION.

I. *The Idea of Possession.*

TO possess is to have absolute power of dealing with the thing oneself and absolute power of excluding the action of everybody else. This condition, so far as actually established, may be a consequence of physical strength, as when the tiger in the zoo guards the raw meat between his paws, or of physical barriers, as when one locks up his valuables against thieves or fortifies a city against an enemy, or of concealment, as when the thing possessed is hidden in order that no one else may deal with it, or of superior agility, as when a dog runs away with a glove,—or it may depend wholly, so far as power to exclude the action of others is concerned, upon a deference to the will of the possessor imposed by habit, the moral sentiment, religion, or law.

Mr. Justice Holmes supposes the case of "a powerful ruffian within equal reach and sight when a child picks up a pocket-book."¹ Which of the two has possession? Sir Frederick Pollock says the child has. He may contravene the ruffian as by tearing the book or throwing it over a cliff.² I conceive the answer to be that the child has possession so far as his will has power to exclude the action of others, and the ruffian has possession so far as *his* will has power to exclude the action of others. As against the ruffian, the child's will, notwithstanding Sir Frederick's suggestions, probably would not give much protection, but, as against every one else, energized by moral sentiment and the commands of positive law, it might be as potent as Richelieu's "awful circle of the church" in Bulwer's play.

Possession is limited, of course, to the thing possessed, but in other respects the idea of possession is the intoxicating one of absolute and unlimited dominion. It is a simple idea. But it is also a highly abstract idea never perfectly realized except in imagination. Attempts are often made to define actual possession. The appearance of power to exclude is sometimes made the test. "When we speak of a power to exclude others," says Mr. Justice

¹ Holmes, Common Law 235.² Pollock and Wright on Possession 15.

Holmes, "we mean no more than a power to exclude which so appears in its manifestation. A powerful ruffian may be within equal reach and sight when a child picks up a pocket-book; but if he does nothing the child has manifested the needful power as well as if it had been backed by a hundred policemen."¹ "In common speech," says Sir Frederick Pollock, "a man is said to be in possession of anything of which he has the apparent control or from the use of which he has the apparent power of excluding others."² And one Zachariae, cited in Savigny's notes, says, "Possession is that relation between a subject matter and man which *intimates* that the man has the *animus domini* and that he is also able to put it into execution."³ Savigny disputes this, and says the mere appearance of power cannot give possession. He makes possession depend on consciousness of physical power. The possessor must have enough power to give rise to the consciousness of unlimited power. "Every case of possession," he says, "is founded on the state of consciousness of unlimited physical power. To create this feeling the desire to have the subject as one's own must exist; and, at the same time, the physical requisites of power which are capable of giving rise to this consciousness."⁴

De facto possession, according to Sir Frederick Pollock, is effective occupation or control. "It is evident," he says, "that exclusive occupation or control in the sense of a real unqualified power to exclude others is nowhere to be found. All physical security is finite and qualified. A strong man is worse to meddle with than a weak man or a child, but the strong man also may be overpowered. . . . Locks may be picked, bolts forced, walls broken. . . . The amount of material difficulty which it is necessary or worth while to set up is found by experience to vary with the circumstances. A dwelling-house is not built or guarded like a prison, and we do not lock up tea and candles in a safe; we should call a banker imprudent who exercised only the same cautions as a private householder. We may say, then, that, in common understanding, that occupation at any rate is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment."⁵

¹ Holmes, Common Law 234, 235.

² Perry, Savigny on Possession 73 g.

³ Pollock and Wright on Possession 1.

⁴ *Ibid.* 170, 171.

⁵ Pollock and Wright on Possession 12, 13.

Attempts to define actual possession are, I think, necessarily futile. "To define possession," says Bentham, "is to recall the image which presents itself to the mind when it is necessary to decide between two parties, which is in possession of a thing and which is not. But if this image is different with different men — if many do not form any image, or if they form a different one on different occasions — how shall a definition be found to fix an image so uncertain and variable?"¹ So might one despair of finding a definition of cold by looking for the degree of temperature which people agree to call cold. The relation of fact to idea in the case of possession is the same as in the case of the geometric conceptions, and trying to say when there is possession is like trying to say whether a thing is or is not round. Imagine Archimedes offering this definition: A thing is round when it is so nearly round one is not conscious it is not round. Or discussing the sphere after this fashion: *Elements of de facto roundness*. A thing is round when it is round enough. A ping-pong ball is not absolutely round, and yet every one will say it is round, — at least until he stops to think about it. On the other hand no one would call a billiard-ball with the contour of a ping-pong ball round. Absolute roundness is nowhere to be found. What is necessary to actual roundness depends on circumstances. Balls on the ping-pong model would not serve for billiards, but they do for ping-pong. We may say that in common understanding a thing is round when it is round enough for practical purposes.

II. *Technical Conditions of Legal Possession.*

The technical conditions of legal possession are subject to no limit of variation. I may be denied the *jus possessionis* for lack of some manifestation of will or I may not. A customer standing at a counter and examining a watch may not have legal possession of it until he has in some way appropriated it. On the other hand the legal possession of an ancestor now passes on his death to his heir. No entry is required on the part of the heir. The owner of sheep and cattle acquires possession of their increase — milk and wool, lambs and calves — without act on his part. And without act on my part I gain possession of soil added to my field by the current of a river, and of the tree which strikes its roots into my ground.

¹ Perry, Savigny on Possession viii.

Continuance of control may or may not be necessary to continuance of legal possession. To gain possession of wild animals I must capture them, and when I lose control of them I lose possession. As a general rule, however, under the common law, loss of power of dealing with the thing does not entail loss of legal possession.

To gain possession by occupation or exercise of right of entry involves sometimes not much more than a mere manifestation of will to exclude. "Where a man . . . was out of seisin," says Sir Frederick Pollock, "but had a right of entry, his entry into any part of the land gave him seisin of all the land in the same county which, if put to his action, he could have recovered in the same action, provided that the entry was made in the name of the whole."¹

Doing something on or by or near the thing may be made a condition of legal possession. The law for instance may require livery of seisin to take place on the land. "*Clavibus traditis*," says the Digest, "*ita mercium in horreis conditarum possessio tradita videtur, si claves apud horrea traditae sint, quo facto confestim emtor dominium et possessionem adipiscitur, etsi non aperuerit horrea.*"² That is to say, if I wish to give possession of goods by delivery of the key of the warehouse in which they are, I must deliver it at the warehouse. But although I may have to go to the warehouse to get legal possession, it does not follow that I must stay there to keep it.

To acquire legal possession of a thing already possessed it may be necessary to get the better of its possessor in some way. If a thief wishes legal possession of my watch, a mere "warning off" will not avail him as it would the discoverer of an islet in the South Sea. Neither will an unsuccessful struggle for it. He must in some way "ease him of his adversary."

If I am entitled to immediate legal possession of land legally possessed by another, I may acquire it under the common law by an entry on the premises in his absence, accompanied by some distinct manifestation of my will to shut him out. "Where one has a right to enter into a house," says Sir Frederick Pollock, "entry into any part of the house even with part of one's body suffices."³ A mortgagee entitled to possession of a house entered

¹ Pollock and Wright on Possession 78.

² Perry, Savigny on Possession 159.

³ Pollock and Wright on Possession 78, 79.

the house, took off the lock of the outer door, and was engaged in putting on a new lock when the mortgagor's tenants appeared on the scene and drove him away. It was held that he had gained possession before he was ejected, and consequently could not be said to have had no ground for alleging a forcible entry on the part of his ejectors.¹ But an entry without right on the land of another will not give me legal possession if accompanied merely by manifestations of my will. Subjection to my will must also be apparent as a fact of the case. If the owner *submits* to my will to exclude him, that may be enough. "A man who is not entitled to take possession," says Mellish, L. J., "can obtain possession only of that which he actually lays hold of."² "*Si cum magna vi ingressus est exercitus,*" says the Digest, "*eam tantummodo partem quam intraverit obtinet.*"³ I am not deemed to have "laid hold of" or to have "entered" a piece of land within the meaning of these propositions until actual subjection to my will to exclude from every part of it has in some way been made manifest.

Whether any manifestation of superior strength unaccompanied by submission, will nowadays give legal possession of another's land is extremely doubtful. Under the Roman law I might enter on another's land with an army and surround it with fortifications, but he was not dispossessed until he knew of my occupation.⁴ If after learning of my entry he did not promptly attempt to drive me off, or attempted to eject me and was beaten off, then and not till then he lost his right of possession.⁵ The rule that an appropriator's superior strength shall not of itself give legal possession is a reasonable one, for it would be difficult to say when such superiority existed. How high and how strong must the fences be, how complicated the locks, how numerous the guards which would serve to dispossess an owner? Such questions would be difficult to answer. But if two meet in combat and one is defeated, or one man knowing that another has appropriated his land stands by for a space of time and does nothing, we have something definite to serve as a basis of a rule.

Trial by wager of battle has gone out of fashion. In the time of Bracton, according to Mr. Maitland, the very act of casting out an owner gave the disseisor legal protection against strangers.⁶

¹ Pollock and Wright on Possession 79.

² Perry, Savigny on Possession 264.

³ *Ibid.* 262, 263.

⁴ *In re Fletcher*, 5 Ch. D. 809, 813.

⁵ *Ibid.* 151, 248, 261.

⁶ 4 Law Quart. Rev. 33.

But this is probably not the modern law. "A trespasser," says Sir Frederick Pollock, "does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner."¹ It is one thing to be beaten and another to give up, and whatever effect modern law may give to mere mastery, the ordinary condition of acquisition of legal possession of land against the will of owners is the exhibition, as a fact of the particular case, of dominion and submission, or adverse possession, a relation to be carefully distinguished from possession *ex consensu* and legal possession. The submission of an owner to an adverse will which will eventually extinguish his right to possess deprives him in the beginning of his right of possession and gives it to his adversary. And the submission of others to the adverse will of an appropriator may give him legal possession of a thing already possessed by one who does not submit, and consequently, if double possession is to be deemed impossible, make him sole possessor.

The facts we think of as constituting adverse possession are significant as evidencing will to exclude and submission to such will. Dealings with land not significant of will to exclude do not give the *ius possessionis*. Farming a piece of land, for instance, is significant, generally speaking, of will to exclude others from dealing with it, but if the surface of the ground and mines beneath it were held by different owners, the farmer's cultivation of the surface would not indicate an intention to exclude the mine owner from his mines, and therefore would not operate to put an end to his possession of them. Again, the dealings of a tenant in common with land held by him are not taken to manifest will to exclude his co-tenant, and therefore do not operate to determine his co-tenant's possession.²

Moreover the facts evidencing adverse possession must not only evidence will to exclude, but submission thereto. Sowing a crop and tilling it without molestation would be good evidence of adverse possession of a field in the country, but it would be little or no evidence of adverse possession of a vacant lot in the lower part of Manhattan. Proof of sowing and tilling without molestation in the latter case would be taken to show nothing but indifference or *gratia* on the part of the owner. Using, without

¹ Pollock on Torts, 6th ed., 371.

² See Pollock and Wright on Possession 86, 87.

disturbance, a vacant city lot as a place of deposit for building materials and refuse would also be very slight evidence of *patientia* on the part of the owner.¹

One's submission to will cannot be inferred from acts of which he has no knowledge. Therefore, if evidence of dealings with land goes to support a claim of possession, evidence (which may not always be admitted in the face of presumptions) that the claimant's adversary or adversaries knew nothing about them goes to defeat it. Lord Blackburn says, speaking of the conclusion as to possession to be drawn from acts of ownership, "No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it."²

To infer correctly dominion and submission from a succession of more or less equivocal acts of user is no easy matter. And if we accept the fact of dominion and submission so proved as a condition of legal possession, we are also obliged to consider what continuance of acts of user shall be deemed to show dominion and submission, and what continuance of dominion and submission shall be deemed to give legal possession, and we may say, I think, that there are no rules to help us to answer either of these questions. In deciding questions as to adverse possession, dealings with land are not commonly distinguished from the dominion and submission of which they are evidence. The question arises in ejectment as to whether the plaintiff has shown possession, and the conscience of the judge finds a certain period of undisturbed enjoyment (which is spoken of as actual possession) a sufficient basis for the *jus possessionis*. "One year's possession under a lease," says Sir Frederick Pollock, "has been held to be enough, though the lessor's title was not shown. Ten years' possession has been decisive even against several years' subsequent possession under colour of title."³

III. *Holmes on Possession.*

"Every right," says Mr. Justice Holmes, "is a consequence attached by the law to one or more facts which the law defines. . . . When a group of facts thus singled out by the law exists in

¹ See Pollock and Wright on Possession 86.

² *Ibid.* 33.

³ *Ibid.* 96.

the case of a given person, he is said to be entitled to the corresponding rights. . . . The word 'possession' denotes such a group of facts. Hence, when we say a man has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation."¹ Here we have the beginning of an attempt to analyze possession after the ordinary fashion. Possession *ex consensu* is to be disregarded, and conclusions are to be reached by considering merely the technical conditions of the *jus possessionis*. In his discussion of the ground of liability for unintentional injuries Mr. Justice Holmes takes account of "facts of a special and peculiar function" whose "function is to suggest a rule of conduct."² In his analysis of possession he does not. And his oversight furnishes an illustration of his statement with reference to liability for unintentional injuries, that after rules based on habit and custom have been framed, "the grounds from which they spring cease to be manifest."³

I have defined adverse possession as a relation of dominion and submission. That is to say, I have supposed the fact of adverse possession to exist when A is manifesting his will that B shall keep off, and B is obeying him. Adverse possession, however, is commonly conceived as a manifestation of will and power to deal with the thing to the exclusion of others. According to this idea to make A an adverse possessor he must indeed be manifesting his will that B shall keep off, but B need not be obeying him. He may be merely holding B off by an exhibition of superior strength.⁴ And A must not be merely excluding B from the thing. He must have some power of dealing with it himself.⁵ Adverse possession, so conceived, may be termed, for the sake of distinguishing it from mere dominion and submission, corporeal adverse possession.

The theory of possession based on the Roman law, which is commonly accepted by civilians, makes the *jus possessionis* an accompaniment merely of corporeal adverse possession, beginning when corporeal adverse possession begins, and ceasing when corporeal adverse possession ceases.⁶ The numerous German trea-

¹ Holmes, Common Law 214.

² *Ibid.* 150.

³ *Ibid.* 145, 146.

⁴ See Perry, Savigny on Possession 150, 151, 373, 374.

⁵ *Ibid.* 121, 253, 254.

⁶ *Ibid.* 27, 146, 147, 246, 366.

tises on possession are elaborate attempts to make this theory fit the facts. German theorists consider adverse possession a consequence of the possessor's power *ex propriis*. That is to say, A is not to be considered possessor merely because B is obeying him, but because A is making B obey him. They accept, however, the fact of obedience as manifesting power to compel it. If I order a man to lie down and he obeys, whatever my power may be, he has in fact submitted to my will. Of such a case the Germans say "the will has made itself actually valid."¹ If the will has made itself actually valid, whether by virtue of the possessor's superior strength or merely by virtue of his adversary's submission, that is enough.

Mr. Justice Holmes adopts the German theory of possession as true to a certain extent of the common law. He does not find the continuance of corporeal adverse possession necessary under our law to the continuance of legal possession,² but he finds something very close to corporeal adverse possession necessary to the acquisition of legal possession. As he expresses it, "To gain possession a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent."³ These conditions he defines elsewhere more exactly as follows: A degree of power over the object is essential,⁴ and there must also be an intent to exclude others⁴ and a relation of manifested power to exclude others co-extensive with the intent to do so.⁵ We have here all the elements of will and power to deal with the thing to the exclusion of others, except that of will to deal with the thing. One "must stand in a certain physical relation to the object," that is to say, he must have "a degree of power over it," some power of dealing with it. He must have an intent to exclude others. And he "must stand in a certain physical relation to the rest of the world," that is, there must be "a relation of manifested power" to exclude others "co-extensive with the intent" to do so, or, in other words, there must be an exhibition either of mastery or of dominion and submission. Mr. Justice Holmes, when he speaks of "a relation of manifested power co-extensive with the intent,"³ adopts the German notion I have referred to of the will making itself actually valid. If A puts

¹ Four German Jurists, 11 Pol. Sci. Quart. 282, 283.

² Holmes, Common Law 237.

⁴ *Ibid.* 220.

³ *Ibid.* 216.

⁵ *Ibid.* 216, 234, 235.

B out we have a relation of manifested power co-extensive with the intent, and we have it also if B, whatever A's power may be, obeys A's order to get out.

Let us consider, first, Mr. Justice Holmes's assertion that there must be a relation of manifested power co-extensive with the intent, that is to say, that there must be an exhibition either of mastery or of dominion and submission. He refers to two cases where such an exhibition was required as a condition of legal possession. "Where two parties," he says, "neither having title, claimed a crop of corn adversely to each other, and cultivated it alternately, and the plaintiff gathered and threw it in small piles in the same field, where it lay for a week, and then each party simultaneously began to carry it away, it was held that the plaintiff had not gained possession. But if the first interference of the defendant had been after the gathering into piles the plaintiff would probably have recovered."¹ That is to say, an inference of submission to the plaintiff's will could have been drawn from the defendant's non-interference. Mr. Justice Holmes also cites *Browne v. Dawson*² as a case where the claimant of possession failed to show a manifestation of power co-extensive with his intent,—a case where it was found that the claimant's adversaries had neither submitted to his will nor been deprived of power to re-enter.

"A relation of manifested power co-extensive with the intent" is not always a condition of legal possession, however, and Mr. Justice Holmes has selected for illustration of his theory a case where he is wrong, I think, in supposing this condition to exist. "A powerful ruffian," he says, "may be within equal reach and sight when a child picks up a pocket-book; but if he does nothing the child has manifested the needful power as well as if it had been backed by a hundred policemen."¹ The finder of a lost pocket-book acquires possession by manifestation of his will. He is not obliged to "manifest power," that is to say, he is not obliged to get the better of any one or procure submission on the part of any one to his will. The respect paid his will by the particular persons to whom it happens to be made known is an immaterial fact. If the pocket-book had belonged to the ruffian, then indeed it would have been necessary to find submission to the child's will as a fact

¹ Holmes, *Common Law* 235.

² 12 A. & E. 624; Holmes, *Common Law* 235.

of the particular case. Such submission might be inferred from his allowing the child to walk off with the pocket-book, but it would hardly be inferred from his allowing him to handle it in his presence. The child's moral power to exclude in the case supposed by Mr. Justice Holmes, arising from the fact that the average man would respect his will, is evidence of actual submission on the part of the ruffian, but it does not follow that his submission is a condition of the child's possession. Moral power to exclude may be a consequence of actual submission. If the owner of a piece of land actually submits to my will to appropriate it, the average man, it may be, will therefore leave me in peace. On the other hand, actual submission may be a consequence of moral power to exclude. I may obey an expression of will that I shall leave a pocket-book alone because the average man would obey such a command. In the first case legal possession is naturally a consequence of actual submission. In the second it is naturally a consequence of the custom of the average man whether any actual submission can be found in the particular case or not.

Neither can it be maintained that will to exclude is always a condition of legal possession, although no doubt it often is, as in cases of acquisition by occupancy. Legal possession passes to a devisee without act on his part. As a man's lessee I am legally empowered to exclude him and other people from the premises, but I need never have had nor have manifested any intention of doing so. A lessee does not receive legal possession because of his intent to exclude. When a landlord delivers a lease and the key of the premises his tenant receives the *jus possessionis* merely because he has manifested his intent to accept power. "If what the law does is to exclude others from interference with the object," says Mr. Justice Holmes, "it would seem that the intent which the law should require is an intent to exclude others. . . . A tenant for years intends to exclude all persons including the owner until the end of his term. . . . If a bailee intends to exclude strangers to the title, it is enough for possession under the law, although he is perfectly ready to give the thing up to its owner at any moment."¹ The actual intent of a tenant for years or bailee to exclude is technically a fact of no consequence. No doubt devisees, lessees, and bailees generally do intend to exclude other people, and the fact that they do is a reason for giving them legal possession, but it is

¹ Holmes, Common Law 220, 221.

not a technical condition of their possession. The fact that the average lessee intends to exclude other people is a reason for giving lessees legal possession, but a lessee's actual intent to exclude is not one of the facts of which his legal possession is the consequence.

So as to power of dealing with the thing. Inability to deal with a thing is a reason for not giving legal possession of it, just as inability to use any gift is a reason for withholding it. But the fact that power of dealing with the thing is always a reason for giving legal possession does not make it always a condition of legal possession. Sometimes it is. Rules as to possession of wild animals, for instance, make it necessary to capture them. But the possession of an heir or grantee is not technically dependent on his power of dealing with the land. It was once, when entry was necessary to possession, but is not now.

IV. *Possession of Rights and Adverse Possession.*

Habitual submission is the *de facto* basis of legal rights generally. As the Declaration of Independence puts it, "Governments derive their *just* powers from the consent of the governed." A right exists where obedience to will is ordained, and the right consists in the power given the will by such ordinance. Austin says, "The party towards whom one is commanded by the sovereign to do or forbear is said to have a right to the acts or forbearances in question."¹ But, according to this definition, a sentenced murderer has a right to be hanged. Right is power. Legal right, Mr. Justice Holmes says, is the "power of removing or enforcing" legal limitations on conduct.² And the Germans define right, without reference to positive law, as "power of willing."³ A legal right is power conferred by law, a moral right, power conferred by the moral sentiment of one's fellows, and right of either sort is power bestowed, not power *ex propriis*. It is "power not ourselves which makes for righteousness," according to Matthew Arnold, and it is power not ourselves which makes for right. A man therefore has not a right merely because his will is obeyed. But habitual submission begets a moral duty to submit, a duty giving moral right to the dominant will, and therefore constitutes a *de facto* basis for legal right. The habitual conformity of a tribe of savages

¹ Austin, Jurisprudence 407.

² Holmes, Common Law 220.

³ Four German Jurists, 10 Pol. Sci. Quart. 685.

to a *modus vivendi*, the habitual observance of the customs of a whale-fishery, are sources of moral and legal right, and habitual submission to the will of an individual has the same consequences. "*Patientia servitutium inducet officium praetoris*," says the Digest.¹ And the proposition is true of "servitude" in its untechnical sense. The patient servant of another's will shall find the judge on the side of his master. "It's a bad thing to *change*." So say the Protestants of the Cevennes, according to Robert Louis Stevenson, with reference to Catholics who turn Protestants. And he adds, "I have some difficulty in imagining a better philosophy."

I have no right to a man's obedience merely because he is obeying me. Nevertheless, according to the Germans, I am "possessing" a right to his obedience,²—a puzzling proposition. But, as Carlyle says of the German definition of a poet, "if well meditated, some meaning will gradually be found in it." When in common parlance we say a man possesses a right we mean he has it. We use the term "possess" merely to express the relation of subject and attribute, as when Hallam says, "The fragments of these lays seem to possess a sort of charm that has evaporated in translation." To "possess" a right, when we have none, is to be requiring and receiving what obedience to the right would give us if we did have it. I "possess" a right to rent, if I am actually demanding and receiving rent, whether I have any right to rent or not. A *de facto* sovereign or office-holder who is actually receiving the obedience due his office "possesses" a right to such obedience whether he has any right to it or not. The Canon Law, according to Savigny, gave significance to the "possession" of every possible right.³ Whoever, for instance, received interest for his capital was said to have acquired "possession" of the right to the capital and the future interest.

"Possessing" a right is a fact of legal significance, or what the Germans call a "juridical" or "juristic" fact, because of the moral and consequent legal effect of long submission to will. One of the German philosophical jurists asks whether a physician can "possess" a right to be employed by a patient.⁴ Savigny says such a "possession" would be an "empty abstraction." "Enjoyment may be conceived as to every right," he says, "but not a

¹ Digest viii. 3, *De servitutibus praediorum rusticorum*, 1, 2.

² See Holmes, *Common Law* 238, 340, and Perry, *Savigny on Possession* 133.

³ Perry, *Savigny on Possession*, 391-395.

⁴ See Perry, *Savigny on Possession* 133, and Holmes, *Common Law* 238 n.

forcible disturbance or usucaption, and yet these are the only conditions under which the exercise of a right is looked upon as a juridical relation."¹ It is quite possible, however, to conceive a physician acquiring by usucaption (or prescription) a right to be employed by a patient. If we should see A employing B as his physician, and, in so doing, submitting for a period of time to B's will, and A in consequence finally bound to employ B as his physician, we should observe a recurrence merely of no uncommon phenomenon. According to Mr. Justice Holmes, a parson was sometimes bound by custom to keep a bull and a boar for the use of his parish,² and custom might, with equal justice, bind his parishioners to use his bull and his boar. The two customs would naturally co-exist.

I "possess" a right while I am acquiring an easement in the land of another by adverse use. Continuous and unresisting submission to my will gives me the right. Servitudes, the Digest says, are established "*per patientiam*, as when one suffers water to be carried through his house by a pipe."³ So long as I am manifesting my will to use a way and not to be hindered in my use thereof and the owner quietly submits, I am in the way of establishing my right. But if the owner, to prevent my passage, places a barrier, and the next time I have occasion to pass I am obliged to remove it, his act of opposition prevents diminution of his right of ownership by my dominion. As Cowen, J., says, there must be "peaceable possession without the hindrance of the owner."⁴ "The presumption of a grant," says Kent, C., "is the foundation of title by prescription."⁵ That is to say, the attitude of the owner must be that of one who has granted the right.

An easement is a right. But to "possess" an easement when the right does not exist, is not, I think, the same thing, in common parlance, as to "possess" a right. When we speak of possessing an easement in course of acquisition, we generally have in mind, not a continuance of dominion and submission, but a continuing exercise of a certain power we have of dealing with the land consequent on such continuance of dominion and submission. And we attribute a prescriptive right to the continuing exercise of power

¹ Perry, Savigny on Possession 133.

² Holmes, Common Law 392.

³ Digest vi. 2, De publiciana in rem actione II, I.

⁴ Colvin v. Burnet, 17 Wend. (N. Y.) 564, 568.

⁵ 3 Kent, 12th ed., 441.

of dealing with the land under cover of unresisted dominion. Bracton says that what gives prescriptive right is "*possessio per longam, continuam et pacificam usum . . . per patientiam veri domini.*"¹ Nevertheless the real "juridical" fact is not the exercise of power consequent on the relation of dominion and submission but the relation itself, and the term "possession" therefore comes to denote such relation with reference to other rights, if not with reference to easements.

Suppose a man, by virtue of an act of appropriation or some other happening, to have possession of a thing *ex consensu* and, in consequence, legal possession,—a legal power of excluding the generality from dealing with the thing. He may, nevertheless, stand in peculiar relations to individuals,—to an owner for instance. If I appropriate a man's house and lock him out, the generality of my fellows may be morally bound to leave me alone. But the owner may remain morally and legally free to re-enter the house and deal with it to the extent of his ability. Or, if that is legally prohibited, the law may promise him legal possession upon suit brought and proof of his case. On the other hand the owner, although morally and legally free to re-enter, or promised reinstatement by the arm of the law if he asks for it, may nevertheless be submitting to the will of the possessor to keep him out and doing nothing. In such a case the relation of dominion and submission styled "possession of a right" reappears, and its continuance operates as in other cases to give right to the dominant will and perfect the moral and legal possession already bestowed upon it.

"The distinction between property and possession," says Sir Henry Maine, "is the distinction between the legal right to act upon a thing and the physical power to do so."² And when we speak of the acquisition of title by long possession or adverse possession we no doubt have in mind, not a mere relation of dominance and submission, but a continuous exercise of a power of dealing with the thing consequent on continuing dominion. When we acquire property in this fashion we "take by use" according to the Romans. Nevertheless the significant fact is the relation of dominance and submission existing with reference to the person whose right is to be affected, a relation evidenced by the fact of

¹ *Sargent v. Ballard*, 9 Pick. (Mass.) 251, 254.

² *Ancient Law*, 3d Am. ed., 281.

undisturbed enjoyment. Dominance and submission may continue without use. Whether a man is able to deal with a thing himself or not, he can continue to warn off others. A ranchman may lose his steers, but his brand will continue to express his will.

The owner's submission to an appropriator of anything belonging to him must be unresisting to furnish a basis of title. "Possession has a double basis," says the Code, "a basis in law and a basis in fact, and each has its legal effect when confirmed by the habitual silence (*silentio ac taciturnitate*) of all adversaries. One cannot be considered to possess during litigation, because although he holds the thing, the pendency of a legal contest makes him uncertain as to the legal basis of his possession."¹ That is to say, if my adversary is contending with me or manifesting opposition either in or out of court, I am not enjoying the quiet submission to my will necessary to the acquisition of property. "*Transferuntur dominia,*" says Bracton, "*sine titulo et traditione per usucaptionem, scilicet per longam continuam et pacificam possessionem.*"² And the French Code enacts that "in order to be able to prescribe," that is, as we would say, to take title to a thing by adverse possession, "there is required possession, continual and uninterrupted, *peaceable*, public, unequivocal and under the title of proprietor."³

Rather a close distinction is to be noted here between *acquiescence* and *leave* or *favor*. If a man is occupying land or using a way across it because the owner gives him leave, his possession is not adverse, — he is not taking by use. The owner is not submitting to him. He is acting under the owner's leave and favor. In *Collins v. Collins*,⁴ for instance, there was held to have been no adverse possession because the possession was "permissive." On the other hand, Putnam, J., in *Sargent v. Ballard*,⁵ says, "The occupation [giving prescriptive right] must be with the knowledge and permission of the owner."⁶ To suffer, without protest, is, in a sense, to permit. But the distinction is between *sufferance* and *favor*, between *patientia* and *gratia*, and it may not be easy to see, in an actual case, which relation exists.

"This tribune dared to decree," says Cicero, "that whatever any one had possessed from the time of Marius and Carbo he should hold by a perfect title." The word "possess" as here used

¹ Code 7, 32, 10.

² Code Napoleon, art. 2229.

³ 9 Pick. (Mass.) 251.

⁴ Co. Litt. 113 b.

⁵ 90 N. W. Rep. 364 (Minn.).

⁶ p. 254.

no doubt imports power of dealing with. The decree referred to provided that the continuing exercise during the period specified of the power of dealing with the *res* due to the dominion of the holder of the land over his adversaries should give the right of property. Now this power of dealing with a thing is commonly referred to as physical power. Sir Henry Maine has already been quoted as defining possession to be a physical power of dealing with. But an appropriator's power of dealing with a thing is not only physical power but moral power. His appropriation gives him, as against the generality, possession *ex consensu*. And he has a power of dealing with the thing due not only to the submission of his adversaries, but to a moral consensus on the part of his fellows generally. We may think of his legal possession against his fellows as the consequence of his power of dealing with the thing, and if we ignore his moral power we may deem it a consequence merely of his physical power of dealing with the thing. But the real basis for his legal possession against his fellows generally is not his power of dealing with the thing, physical or moral, but such moral consensus. If the common conscience ordained a general respect to his will, his title or "natural right" to legal possession would not be affected by the fact that he had neither will nor power to deal with the thing itself.

The ordinary case, therefore, of a possessor without title displays this *de facto* basis, — possession *ex consensu* as against the generality and a continuing dominion and submission with respect to adversaries. And with this *de facto* basis we may build our legal structure in various ways. We may give the possessor *ex consensu* legal possession as against every one but the owner forthwith. We may give him legal possession as against no one until long dominion has given him a moral right as against the owner. Or we may give him legal possession against every one, including the owner, forthwith (leaving open to the owner only the *via legis*) and give to his long dominion the effect of finally extinguishing the owner's right of action. Our law (barring its prohibitions of *vis armata*) leaves the owner free to take and deal with his own.¹ The Roman law barred the *via facti* against him.² Our law, and the Roman law as well, give an appropriator legal possession of land owned by another. He might be denied protec-

¹ Holmes, Common Law 210.

² Perry, Savigny on Possession 304, 313, 328, 336, 343, 345.

tion of any sort before extinguishment of the owner's right, just as a person acquiring by prescription a right of way has (with us at least) no protection against hindrance of his use by any one until the right has been acquired.¹ "A way, until it becomes a right of way," says Mr. Justice Holmes, "is just as little susceptible of being held by a possessor's title, as a contract."² In *Northern Pacific R. R. Co. v. Lewis*,³ the court held a trespasser had no possession of timber which he had cut in government forests and stored on government lands. It does not follow, necessarily, from this decision that the trespasser could not get title by a continuous and undisputed assertion of dominion. If B built a fence around A's field and proceeded to raise crops, everybody might remain perfectly free, as against B, to tear down the fence and root up the crops. And yet if B continued to maintain the fence and raise crops, and A did nothing, B might in time acquire a legal right to exclude A and everybody else.

Albert S. Thayer.

¹ Holmes, *Common Law* 241, 354.

² 162 U. S. 366.

³ *Ibid.* 354.

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COVENANTS RUNNING WITH THE LAND ENFORCEABLE IN EQUITY. — At common law in England the burden of covenants running with the land does not pass to an assignee of the covenantor. Nevertheless, if the assignee takes without value or with notice of the covenant, equity will enforce the burden against him, usually without regard to whether or not the covenant fulfills the requirements of covenants running with the land at law.¹ It is well settled in England, however, that the jurisdiction of equity extends only to restrictive covenants, and that the courts will not enforce affirmative agreements against any one but the original covenantor.² By the common law rule as often stated in this country the burden and the benefit of covenants running with the land pass respectively to the assignees of the covenantor and of the cantee.³ Accordingly the Appellate Court of Indiana has recently decided that the plaintiff who conveyed land to a railroad which had covenanted to build and maintain fences along its right of way, may recover at law against the assignee of this railroad for breach of these covenants. *Chicago & S. E. R. R. Co. v. McEwen*, 71 N. E. Rep. 926 (Ind., App. Ct.).

In view of this difference in the law it may well be asked whether our courts of equity will follow the English rule of enforcing only restrictive agreements. It must be clear that wherever, as in the Indiana case, the

¹ *Tulk v. Moxhay*, 2 Ph. 774.

² *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750.

³ *Midland R. R. Co. v. Fisher*, 125 Ind. 19 (covenant to fence); *Fisher's Executors v. Lewis*, 1 Clark (Pa.) 422 (covenant to build); *Gilmer v. R. R. Co.*, 79 Ala. 569 (covenant to build flag-station); *Sims, Covenants* 148.

plaintiff may get damages for the breach of an affirmative agreement he must have also a right to specific performance, subject only to the ordinary limitations of equity in enforcing contracts which require affirmative acts on the part of the defendant. Thus a covenant to build and repair a fence has been enforced specifically against a grantee of the covenantor on the ground that he was liable at law.⁴ In these cases equity has concurrent jurisdiction, and they can accordingly be distinguished from the English cases, for while under the English view notice or absence of value is essential to charge the defendant, here neither is of importance because he is already charged at law.⁵ Of course wherever the covenant is such that it can run only in equity the rules of the English courts in regard to notice and value would apply. But it is doubtful whether even in such cases the American courts will confine themselves to the enforcement of restrictive agreements only. The basis of enforcing such agreements at all against the assignee must be that as he took the premises with full notice of the covenant, he probably paid less for them than would otherwise have been the case, and if he were now allowed to escape the obligation, he would be unjustly benefited at the expense of the covenantee.⁶ It is hard to see why this argument does not equally apply to the enforcement of affirmative as well as negative covenants. It may be said that in the case of an affirmative covenant the promisee still has his remedy against the original promisor; but it is at least doubtful whether the same be not true of a restrictive agreement.⁷ A more probable explanation of the English rule is to be found in the hesitation which courts of equity for a long time felt in compelling a defendant to do affirmative acts in the performance of a contract. If the English rule can be regarded as arising from this erroneous notion of the power of a court of equity, and not as resulting from any peculiar circumstances surrounding these covenants, there would seem to be no reason for adopting it in this country.⁸

THE REQUIREMENT OF ACTUAL NOTICE TO NON-RESIDENT DEFENDANTS IN DIVORCE PROCEEDINGS. — Although it seems highly desirable that uniform rules concerning the extra-territorial validity of divorce decrees should be applied in the various states, there exists in that branch of American law no little confusion, due to the conflicting conceptions which the different courts have held as to the real nature of divorce proceedings. The view formerly held in New York and a few other states that such proceedings are proceedings *in personam* requiring personal service within the state in order to affect the status of the defendant has been rendered untenable by a decision of the Supreme Court of the United States.¹ The New Jersey doctrine, which has found considerable support in the courts of other states and among the text-writers,² apparently recognizes that the proceedings are not strictly *in personam*, but assumes that they partake to some extent of that character. Consequently, as is shown by a recent case, it is

⁴ *Countryman v. Deck*, 13 Abb. New Cas. 110.

⁵ *Ibid.*

⁶ 17 HARV. L. REV. 176.

⁷ *In re Poole & Clarke's Contract*, [1904] 2 Ch. 173.

⁸ *Bald Eagle, etc., R. Co. v. Nittany, etc., R. Co.*, 171 Pa. St. 284. See *Lydick v. B. & O. R. R. Co.*, 17 W. Va. 428.

¹ *Atherton v. Atherton*, 181 U. S. 155.

² *Minor*, Conflict of Laws § 94.

held that although the courts of the plaintiff's domicile have jurisdiction of that party's status as of a *res*, the fact that the other party's status is necessarily concerned renders the proceeding a proceeding *in personam* to the extent of making actual notice of the pendency of the suit a necessity when such notice is possible. *Davenport v. Davenport*, 58 Atl. Rep. 535 (N. J. Ch.). Although it is difficult to support this rule as a requirement for jurisdiction, a distinction certainly exists between divorce proceedings and other proceedings *in rem*, and on grounds of public policy such a requirement by legislation in each state might seem desirable.

In the absence of any such legislation, however, the theory which seems based on the soundest reasoning makes no requirement of personal notice to the non-resident. Jurisdiction of the status of one of the parties is the only essential. It must be obvious that every sovereignty has power to determine the status of its own citizens, and that this power cannot be altered by the fact that the nature of the marriage relation is such that it is terminated by changing the status of one of the parties. In other words, divorce proceedings, in so far as they affect the status of the domiciled citizen, are proceedings *in rem*,³ and all that is necessary to give them validity is that they shall not be taken without due process of law. With this qualification, as in the case of other actions *in rem*, the laws regulating the procedure and providing for substituted service may vary in the different states; and in every case in which the plaintiff was actually domiciled in the state rendering the decree, the courts of other states, it is submitted, should inquire only whether the provisions of the local law for substituted service have been fully complied with. This view, which is supported by the authority⁴ of some decisions and of some text-writers, seems likely to prevail with the Supreme Court of the United States; for in some very weighty *dicta*⁵ that tribunal has declared in effect that each state has power to prescribe the conditions on which divorce proceedings may be commenced and carried on within its territory.

DOUBLE JEOPARDY. — The Supreme Court of the United States has recently enforced the rule that one trial, save in certain exceptional cases, constitutes one jeopardy, and that a defendant, after a trial in one court, is protected by constitutional or common law prohibitions of double jeopardy, from being again tried for the same offense. *Kepner v. United States*, 24 Sup. Ct. Rep. 797. Mr. Justice Holmes, dissenting, contends that, within the meaning of the Constitution, there is but one jeopardy in one entire cause as carried through to its termination in a court of last resort. This interpretation, forbidding only a trial on a new and independent indictment for an offense for which the defendant has already been tried, enables an appeal at the instance of either party. Arguing that in regard to an appeal the rights of the prosecution and of the prisoner should be identical, he declares insupportable the theory of waiver, which justifies an appeal by the prisoner only. He believes a man cannot waive so fundamental a constitutional right as the protection against double jeopardy.

³ *In re Newman*, 75 Cal. 213.

⁴ *Thompson v. State*, 28 Ala. 12.

⁵ See *Pennoyer v. Neff*, 95 U. S. 714; *Cheely v. Clayton*, 110 U. S. 701; *Cool*, Const. Lim., 6th ed., 499; 2 Bishop, Marriage, Divorce, and Separation § 152.

Although it may be difficult to square with strict rules of logic the prevailing theory of double jeopardy, and although legal technicalities are required to explain some of its operations,¹ yet it is to be remembered that the basis of the theory is not the doctrine of *res judicata*, but the protection of the individual from harassing prosecutions. The double jeopardy of the Constitution is in the main the double jeopardy of the common law at the time of the adoption of that instrument, and seems to bear the construction given it by the majority opinion. Perhaps we have outgrown the necessity of such protection as it gives against the prosecuting officers; but except where there have been statutory changes in states whose constitutions admit of them,² the prosecution cannot appeal, and an appeal by the prisoner is dependent upon a waiver.³

Whether a waiver of a constitutional or common law right is to be allowed should depend upon the purpose of that right and upon principles of public policy. Thus, while courts often refuse to permit a waiver of fundamental rights in which the public has an interest as essential for the protection of life and the proper conduct of trials, yet where the waiver results in nothing but benefit to the accused it is often allowed.⁴ Because a waiver, in capital cases, of jury trial,⁵ or of the legal number of jurors,⁶ or of presence at the trial,⁷ might result in capital punishment at the instance of an incompetent tribunal, it is forbidden. But, on the other hand, an accused may waive his right not to testify against himself, or the right of being confronted with witnesses,⁸ or the right to a copy of the indictment,⁹ all of which are intimately connected with due process of law. Since a waiver of double jeopardy in case of conviction cannot injure the accused and may be for his great advantage in securing a proper trial and perhaps acquittal, no reason arising from public policy or from the purpose of the privilege would seem to forbid its exercise.

THE DESIRABILITY OF A SINGLE COURT OF PATENT APPEALS. — To relieve congestion in federal litigation, the circuit courts of appeal were established, and, subject only to the power of review on *certiorari* by the Supreme Court, were given final jurisdiction in patent cases. The creation of nine appellate courts, with no common superior as to patent cases, naturally resulted in a conflict of decisions upon questions regarding the same patent. Thus the seventh circuit refused to adopt a decision of the eighth circuit upholding the validity of a patent;¹ and on *certiorari* the Supreme Court declared that no obligation rests on one circuit to follow an adjudication in another.² Consequently, a circuit court of New York, in a recent suit for infringement, when confronted with a decision of

¹ See *Mixon v. State*, 55 Ala. 129.

² See *State v. Lee*, 65 Conn. 265.

³ *United States v. Sanges*, 144 U. S. 310.

⁴ 6 Crim. L. Mag. 182.

⁵ *Harris v. People*, 128 Ill. 585.

⁶ *Thompson v. Utah*, 170 U. S. 343, 353.

⁷ *Hopt v. Utah*, 110 U. S. 574.

⁸ *Shular v. State*, 105 Ind. 289, 298.

⁹ *Lisle v. State*, 6 Mo. 426.

¹ See *Mast, Foos & Co. v. Dempster Mill Mfg. Co.*, 82 Fed. Rep. 327; *Stover Mfg. Co. v. Mast, Foos & Co.*, 89 Fed. Rep. 333.

² *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485.

the Circuit Court of Appeals for the seventh circuit, and a later contrary decision, on the same facts, by the Circuit Court of Appeals for the second circuit, followed the Court of Appeals of its own circuit.³ *Eldred v. Breitwieser*, 132 Fed. Rep. 251. The result is that a patent which gives rise to rights and liabilities in Connecticut, New York, and Vermont may in Illinois, Indiana, and Wisconsin be a mere nullity.

The only relief for this anomalous condition, at present, lies in review, upon *certiorari* or certification, by the Supreme Court. Although a circuit court of appeals may certify its inability to decide an issue, the mere existence of contrary views in different circuits is not of itself sufficient ground for submission of a question to the Supreme Court.⁴ That some remedy is needed is evident. The government, by conferring letters patent, grants exclusive enjoyment in one piece of property throughout the jurisdiction of the United States. The construction of this grant, which is matter for the courts, should be co-extensive with the right which it purports to confer. The patentee, on the one hand, is entitled to complete protection, if he has justly been given a public grant. A patent, on the other hand, "in a broad sense deals with and determines the rights of the public;"⁵ if invalid, the public should have its invalidity recognized throughout the United States. Patent rights rest upon grounds of policy which ought not to be defeated by ineffective patent jurisdiction.

The remedy of *certiorari* to the Supreme Court is inadequate, for the duration of a patent is too short to justify submission to the slow process of suits through circuit courts of appeal and the Supreme Court. To secure prompt unanimity of decision upon the same patent as well as uniformity of principles guiding patent adjudication, the American Bar Association has cogently argued that the present jurisdiction of the nine circuit courts of appeal should be lodged in one court.⁶ It may be objected that such a plan will create a "class court," and that judges, confined to patent cases, will become too technical in the application of the law. But patent law is *sui generis*, and should be administered by judges specially fitted for the work. The danger of undesirable technicality in adjudication is obviated by the plan of the Bar Association, which provides for only one permanent justice assisted by circuit judges appointed for the term of six years.

LIMITATIONS OF THE DOCTRINE OF CONSTRUCTIVE NOTICE BY POSSESSION. — The theory upon which courts proceed in holding possession to be constructive notice of whatever rights the occupant may have in the premises is that possession, being *prima facie* evidence of some interest in the land by the tenant, should normally place a purchaser upon his guard and lead him to investigate the extent and nature of such interest. Any failure on his part to make inquiry is, therefore, regarded as an exhibition of negligence or bad faith which ought to place him in no better position than that of a purchaser with full knowledge of the adverse claim.¹ In some juris-

³ But see *Pelze v. Geise*, 87 Fed. Rep. 869.

⁴ *Columbia Watch Co. v. Robbins*, 148 U. S. 266.

⁵ *Jenkins, J., in Electric Mfg. Co. v. Edison, etc., Light Co.*, 61 Fed. Rep. 834, 837.

⁶ See Report of Committee on Patent, Trade-mark, and Copyright Law, 26 Reports of Am. Bar Ass. 460 (1903).

¹ *Rublee v. Mead*, 2 Vt. 544.

dictions, however, this doctrine has been extended to cases hardly within its reasoning. For example, it has been decided in Michigan that possession by one tenant in common is constructive notice of an unrecorded conveyance to him from his co-tenant, as against a subsequent mortgagee of the latter who had no actual notice.² Taking for granted the proposition that possession under a contract to purchase is constructive notice of the possessor's rights, it is argued that the rule cannot be altered by the fact that such possessor holds also a present record interest in the land. The Supreme Court of Texas, apparently disregarding a former contrary decision in its own jurisdiction,³ has recently reached the same conclusion. *Collum v. Sanger Bros.*, 82 S. W. Rep. 459.

If the reasoning of these cases is correct it must be equally applicable to an unrecorded release by the remainderman to a tenant for years, for life, or in tail against a subsequent vendee, mortgagee, or judgment creditor of the remainderman without actual or record notice of the conveyance. And the question is squarely raised whether possession which may be explained under a right appearing of record should be constructive notice of another and different right. As the object of the registry system is to facilitate transfers of land by protecting those who deal with the owners of the record title, the purchaser ought, unless there is some potent reason to the contrary, to be able to rely upon the record. Therefore, when his search reveals an instrument entirely consistent with the possession of the tenant, he should be permitted to consider it a complete explanation.⁴ Under such circumstances he certainly is not acting negligently or in bad faith. Evidently one of the parties must suffer from the wrongful act of the original grantor, but justice demands that it should not be the wholly innocent party. Since the difficulty was made possible by the laches on the part of the tenant in failing to have his conveyance recorded, he should suffer the consequences.

IMPUTED NEGLIGENCE IN THE CASE OF A GRATUITOUS PASSENGER. — It is generally settled that a passenger in a public conveyance does not so identify himself with the carrier that the latter's negligence, contributing to the passenger's injury, prevents his recovery from a negligent third party.¹ The position of a gratuitous passenger in a private conveyance not controlled by his own servant, though seemingly based upon similar principles, is perhaps more in dispute. Many cases of the sort, apparently involving imputed negligence, have in reality gone off upon other grounds. For example, the passenger himself may be negligent in permitting an incompetent person to drive him. More frequently a plaintiff is guilty of actual negligence at the time of the accident; for if he has any control over his host or his driver he is not absolved from a duty to take reasonable care in noticing and pointing out dangers.²

But for imputed negligence itself we find a well-recognized field in cases of joint enterprise. Familiar instances are where a number of men hire a

² *Weisberger v. Wisner*, 55 Mich. 246.

³ *Allday v. Whitaker*, 66 Tex. 669.

⁴ *Palmer v. Bates*, 22 Minn. 532; *May v. Sturdivant*, 75 Iowa 116; *Plumer v. Robertson*, 6 Serg. & R. 179 (Pa.); *Staples v. Fenton*, 5 Hun 172.

¹ *Little v. Hackett*, 116 U. S. 366.

² *Whitman v. Fisher*, 98 Me. 575; *Allyn v. Boston, etc., R. R. Co.*, 105 Mass. 77.

barge for an excursion, or where they are using a team for their own pecuniary profit, not for that of their employer, in moving furniture.³ In such an undertaking each is authorized to act for all with respect to the means employed in executing the common purpose.⁴ Each, as principal, has a corresponding right of control and direction. From this community of interest and control it may easily and justly follow that one of the participants impliedly assumes a liability to third persons for the negligence of his fellows, and at the same time a disability to sue for injuries to which they have contributed.⁵ The sole basis for imputed negligence so called would then seem to be some such privity as that existing between principal and agent, one dependent upon an express appointment or upon an appointment implied from such an interest and control as may properly make one responsible for the negligent acts of another.⁶ In Michigan, although contributory negligence is still imputed to the ordinary gratuitous passenger, in line with the now overruled English case of *Thorogood v. Bryan*,⁷ a recent decision in that jurisdiction, recognizing that such imputation of negligence is founded upon a "fiction" of agency, refuses to impute to a child the negligence of its driver, for the excellent reason that an infant is incapable of having an agent. *Hampel v. Detroit, etc., Ry. Co.*, 100 N. W. Rep. 1002. Consistency would appear to demand that the adult passenger in Michigan and wherever contributory negligence is imputed be liable directly, upon this doctrine of agency, for his driver's negligence. These two results, the liability and the disability, seem inseparable in any case of imputed negligence. It is difficult to conceive of such a privity as will bring about the one and not the other.⁸ If the negligence of A is to be treated as the negligence of B it must be so treated for all purposes.

The majority of courts, however, fail to find any privity or agency in the usual case of a gratuitous passenger and his host or driver.⁹ They are coming to treat in the same way the gratuitous passenger and his host, the paying passenger and his carrier, and the infant and his custodian. Consequently in each of these cases where they find no such privity as should directly tax the one for the other's fault he is not indirectly taxed by means of imputed negligence for the other's contribution.

FOREIGN STATUTES OF LIMITATION.—The courts of one state will enforce a right acquired in another state, but in so doing will apply their own law of remedies. Since a statute of limitations is generally held to affect the remedy and not the right, in a suit on a right acquired in another state, the statute of limitations of the forum will be applied.¹ If, however, in the jurisdiction in which the right is acquired, the rule of law is that the statute of limitations destroys the right as well as the remedy, no action will lie in another jurisdiction after it is barred in the jurisdiction in which

³ *Cass v. Third Ave. R. R. Co.*, 47 N. Y. Supp. 356.

⁴ See *Kopplitz v. City of St. Paul*, 86 Minn. 373.

⁵ *Stroher v. Elting*, 97 N. Y. 102; see *Elyton Land Co. v. Mingea*, 89 Ala. 521, 529.

⁶ *The Bernina*, L. R. 13 App. Cas. 1, 16.

⁷ 8 C. B. 115.

⁸ *Beach, Contrib. Neg.* § 103 *et seq.*

⁹ *Union, etc., R. R. Co. v. Lapsley*, 51 Fed. Rep. 174; *Cunningham v. City*, 84 Minn. 21. *Contra*, *Prideaux v. City*, 43 Wis. 513.

¹ *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 312.

the right arose.² When suit is allowed upon a foreign right, although the foreign statute of limitations has run against it, on the ground that the statute affects the remedy only, one feels that justice has been sacrificed to a theory. Enactments have therefore been passed in most states refusing a remedy in their courts in such a case. The objection to a suit of that kind is especially forcible when the right arises solely under a statute of the foreign jurisdiction. In that case, the courts, without the aid of legislation, have generally made a distinction. If the statute giving the right contains a proviso that action on the right must be brought within a given time, it cannot be brought after that time in any jurisdiction.³ This provision of limitation is regarded as a condition or qualification of the right, determining its nature and extent, and affecting the right into whatever court it is taken. Such a provision of limitation need not be contained in the same section of the special statute,⁴ but it must be a special limitation upon the action or class of actions contained in that statute, and not merely a limitation applying to the whole body of actions generally.⁵ Where, however, a statute gives a right under certain circumstances, which circumstances have occurred, and thereafter a retroactive statute is passed limiting the time within which any suit may be brought, it can hardly be said that this limitation, though made applicable to the right in question, is a qualification of that right at the time it came into existence. However, it has been recently decided that in this case, also, the *lex loci* will govern. *Davis v. Mills*, 194 U. S. 451. The court reached its decision by holding that the limitation was of the kind which destroyed the right. Had the right in question been a common law right, and the statute of limitations a general one, the court would undoubtedly have held that the limitation affected not the right but only the remedy. Since it could not be regarded, however, as a qualification of the right when created, there seems no logical reason for holding the reverse of this merely because the right arose under statute, and the limitation was made particularly applicable to it. Though the result is illogical, it nevertheless strikes one as desirable that recovery should be forbidden on a statutory right which is expressly barred by statute in the state which gave it. Having in mind the distinction already made in regard to statutes containing a proviso of limitation, the court may have felt that the present further step presented no very serious difficulty. The result of the authorities, therefore, would seem to be that in all cases where a statute gives a right unknown to the common law, and either in this statute or elsewhere a special period of limitation is placed for that right or class of rights, that limitation will be enforced wherever suit is brought.

RIGHT OF THE DEVISEE OF A MORTGAGED ESTATE TO CLAIM EXONERATION OUT OF PECUNIARY LEGACIES. — In marshalling the assets of a decedent for the payment of debts and legacies the rule that the personal estate is the natural primary fund for the payment of debts contracted by the deceased is universally recognized.¹ Some limitations to this rule have

² *Perkins v. Guy*, 55 Miss. 153.

³ *Pittsburg, etc., Railroad Co. v. Hine*, 25 Oh. St. 629.

⁴ *Boyd v. Clark*, 8 Fed. Rep. 849.

⁵ *O'Shields v. Georgia Pacific Railway Co.*, 83 Ga. 621

¹ 2 Woerner, Am. Law of Administration 1093.

grown up however. One of these, the holding of mortgaged land which has come to a devisee primarily liable for the mortgage debt, is discussed in a recent article in the Virginia Law Register. *The Equitable Doctrine of Marshalling the Assets of a Decedent's Estate for the Payment of Debts*, by C. B. Garnett, 11 Va. L. Reg. 175. That the mortgagee in such cases may, in the absence of statutes, resort to the personalty for the payment of the debt is not questioned.² When he does this, however, to the detriment of pecuniary legatees, equity gives those legatees a claim on the estate to the extent to which funds, otherwise theirs, have been applied in discharging the debt. This has long been settled in England.³ At present, in that country, the matter is to a large extent covered by statutes.⁴ The English doctrine is generally followed in the United States,⁵ though not universally.

It would seem that the prevailing view is not wholly unassailable. It is not altogether easy to see the grounds on which the courts have taken the mortgage debt out of the class of other debts. In the case of a vendor's lien on land devised it has been held that pecuniary legacies may be encroached upon for the exoneration of the land and that the legatees do not thereby gain the right to be repaid out of the land.⁶ For the purpose of deciding which of two objects of a testator's bounty is to be preferred to the other, the distinction between the devisee of land for which the testator has not paid and the devisee of land on the security of which he has obtained a loan seems somewhat fine. Moreover, the early decisions apparently proceeded upon the assumption that as against the pecuniary legatee the devisee of a mortgaged estate had the equity of redemption only.⁷ It would seem to follow that he should have no more as against the residuary legatee. Yet the courts hold that as against the residuary legatee the devisee is to be preferred.⁸ The doctrine under discussion, although followed, has been frequently criticised by English courts. In a comparatively recent case, while the court regarded the rule as too well settled by authority to be changed, it was pointed out that there seems to be no real reason for holding that the devisee of mortgaged land is less entitled to preference than the pecuniary legatee, both being at least equally objects of the testator's intended bounty.⁹ In the United States there are a few decisions holding that unless the testator has expressed a contrary intention a devisee of mortgaged real estate is entitled to have the mortgage discharged out of the personal estate even though the latter is insufficient to pay general pecuniary legacies.¹⁰ It would seem as a matter of logic that this view is to be preferred to that of Mr. Garnett, who supports the doctrine followed by the weight of authority.

MODERN VIEWS OF CHAMPERTY AND MAINTENANCE. — The first definite recognition of champerty and maintenance in English law is found in a series of statutes of Edward I., making them criminal offenses.¹ The object

² *Hewes v. Dehon*, 3 Gray (Mass.) 205.

³ 17 & 18 Vict. c. 113.

⁴ *Todd v. McFall*, 96 Va. 754.

⁵ *Wythe v. Henniker*, 2 Myl. & K. 635, 644.

⁶ *Thomas v. Thomas*, 17 N. J. Eq. 359.

⁷ *In re Smith*, [1899] 1 Ch. D. 365.

⁸ *Brown v. Baron*, 162 Mass. 56.

⁹ *Lutkins v. Leigh*, Cas. t. Talb. 53.

⁵ *Gould v. Winthrop*, 5 R. I. 319.

¹ See *Schomp v. Schenck*, 40 N. J. Law 195, 205.

was to prevent intimidation of the courts by the great lords, who by enlisting in suits in which they had no proper interest, overawed courts and juries, and perverted "the remedial process of the law into an engine of oppression."² Although under modern conditions this danger of intimidation has passed away, still "the public advantage, even with powerful and incorruptible courts, of 'letting sleeping dogs lie,'"³ and the public necessity of discouraging "the traffic of merchandising in quarrels, of huckstering in litigious discord,"⁴ demand as strongly as ever the condemnation of these practices. The immense volume of our present-day personal accident litigation, however, might serve to suggest that this consideration has not always been borne in mind by the courts.

Champerty and maintenance have been discountenanced in three ways: (1) as crimes, (2) as torts, giving a right of action, aside from that for malicious prosecution, based on the right to freedom from molestation by suit, and (3) as illegal acts sufficient to render contracts involving them unenforceable. As criminal offenses they are obsolete,⁵ nor is the action for damages common. The practical modern interest, therefore, centers in their possible effect upon the legality of contracts. A contract by an attorney to prosecute an action at his own expense, in behalf of his client, for a share of the proceeds of the suit, is the typical modern case. Such a contract, of course, falls exactly within the old definition of champerty; and the English courts, even though the attorney, in the utmost good faith, agree to take the righteous cause of a penniless client for a contingent fee of ten per cent of the recovery, refuse to enforce it.⁶ By American courts, on the other hand, all such contracts are usually enforced, but on various theories.⁷ Some courts, looking only at the old statutes, and seeing that the danger of intimidation of the courts does not exist in the United States, reject the whole doctrine.⁸ Such a view was expressed in the recent case of *Smits v. Hogan*, 77 Pac. Rep. 390 (Wash.). Others recognize the illegality of champerty and maintenance at common law, but evade the logical result wherever possible by technical distinctions. For example, if the attorney agree to pay the costs of the suit, the contract is champertous; if he agree to prosecute the action at the client's expense, for a contingent fee, it is not champertous.⁹ And in Massachusetts, if the attorney stipulate for one-fourth of the proceeds, the contract is champertous; if he is to receive an amount equal to one-fourth of the proceeds, it is good.¹⁰

Thus both English and American courts, while taking opposite views, seem to have this in common, that they ignore the vital question as to whether or not the particular contract under consideration is in reality against the public interest, as being vexatious and tending to promote strife, or as being extortionate and unconscionable. Unless it is against public policy for one or the other of these considerations, there would seem to be no reason for not enforcing it. This position has been taken in British India, and approved by the Privy Council.¹¹

² 2 Cooley, Bl. Com., 3d ed., bk. IV, 135.

³ 6 L. Quar. Rev. 169.

⁴ Knight Bruce, L. J., in *Reynell v. Sprye*, 1 De G. M. & G. 660, 686.

⁵ 3 Steph., Hist. Eng. Crim. Law 234.

⁶ *Strange v. Brennan*, 15 Sim. 346.

⁷ *Bayard v. McLane*, 3 Harr. (Del.) 139, 216.

⁸ *Mathewson v. Fitch*, 22 Cal. 86.

⁹ *West Chicago, etc., Commissioners v. Coleman*, 108 Ill. 591, 601.

¹⁰ *Blaisdell v. Ahern*, 144 Mass. 393, 395.

¹¹ *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, L. R. 2 A. C. 186, 210.

RIGHTS AND LIABILITIES OF EXECUTORS. — The necessity for some legal means by which the claims of a testator could be collected and his debts paid was met in the Roman law by the fiction that the testator's legal *persona* in which were vested all his rights and obligations, was continued in the heir.¹ In the English law the practice of making sealed instruments run from the obligor and his heirs to the obligee and his heirs, only partially relieved the difficulty. The courts in the early cases finally solved it by regarding the executor as "the attorney of the deceased,"² and the goods as being "*bona testatoris* and only *in custodia executoris*."³ The use of the term *executor* and such other terms as *gardiator*, *procurator*, and *dispensator*, seem to suggest a mere power to carry out the wishes of the testator. On this theory the authority of the executor over the personality might well be regarded as analogous to the power, sometimes possessed by him, to dispose of the realty held by the heir or devisee. In neither case is title in the executor.

Either the fiction that the executor continues the legal *persona* of the deceased, or the conception of the executor as the donee of a power, explains the limitations on his authority. Under the former theory, he is like a corporation *sole* with enumerated powers. His duty is to collect and distribute the estate. Accordingly, he cannot sue for the personal wrongs to the testator, not prejudicial to the estate.⁴ Neither can he make contracts,⁵ nor continue a partnership of the deceased, even for the benefit of infant children, without incurring personal liability to creditors.⁶ The same result is reached on the view that the executor is merely empowered to administer the estate, for he can do no act beyond the scope of his authority.

Without resort to one of these fictions it would seem impossible to explain not only these cases but also the following well-settled propositions. First, one incapable of holding property may be made an executor.⁷ Second, on the one hand, property held as executor is not forfeited by sentence of outlawry;⁸ and cannot be taken upon execution against the executor as an individual;⁹ nor does it pass to his assignee in bankruptcy.¹⁰ On the other hand, the executor's own property is not liable for the debts of the testator.¹¹ Third, a particular estate, held by the executor as executor, does not merge in the fee acquired by him as an individual.¹² Fourth, chattels bequeathed to an executor, are held by him in his repre-

¹ See Prof. Langdell in 4 HARV. L. REV. 101; see also Maine, *Ancient Law* 5th ed. 181.

² Gargraffe's Case, 14 H. 6 f. 146 cited in 3 Bulst. 1, 24.

³ Stanford fol. 188 f. cited in 3 Bulst. 1, 24. Simon de Montfort appointed his wife, not as his executor, but as his attorney. See 2 Poll. & Maitland, *Hist. of Eng. Law* [2d ed.] 336.

⁴ Chamberlain v. Williamson, 2 M. & S. 408.

⁵ Johnson v. Wallis, 112 N. Y. 230.

⁶ See Parker v. Pratt, 1 T. R. 287; Allsop v. Mather, 8 Conn. 554; but see *contra*, Tisch v. Rockafellow, 209 Pa. 419. The executor may, however, continue the partnership as a trustee. In that case he would still be liable personally. For the distinction between an executor and a trustee, see Ames, *Cas. on Trusts* [2d ed.] 73, 74.

⁷ See 21 H. 6 f. 7, and cases cited in King v. Hanger, 3 Bulst. 1, 24.

⁸ Gargraffe's Case, *supra*, and cases cited in King v. Hanger, 3 Bulst. 1, 24.

⁹ Farr v. Newman, 4 T. R. 621.

¹⁰ Note, 3 Burr. 1369. The property does pass to the assignee in bankruptcy if the executor had previously treated the property as his own. Quick v. Staines, 1 Bos. & Pul. 293.

¹¹ Harrison v. Beacles, 3 T. R. 688.

¹² Webb v. Russell, 3 T. R. 393.

sentative capacity, until election to take as legatee.¹³ Fifth, the rights of an executor vest at the death of the testator, so that he may sue for subsequent trespasses committed before his approval by the court. Finally, on a claim against the estate, the executor must be sued as executor.

The doctrine of dual personality was lately applied in New York, where an executor sued both individually and in his representative capacity was permitted to be represented by two counsels. *Roche v. O'Connor*, 95 N. Y. App. Div. 496. This fiction is also used by Mr. Justice Holmes to explain the rule which makes residuary legacies general rather than specific.¹⁴ Formerly¹⁵ the executor was entitled to the residue, not "as legatee of those specific chattels, but because he represented the testator, and therefore had all the rights which the testator would have had after distribution."¹⁴ Although the residue, to-day, is usually bequeathed specifically, its character as a general bequest is retained.

RECENT CASES.

AGENCY — LIABILITY OF PRINCIPAL TO THIRD PERSONS IN TORT — RESTRICTION OF CHOICE TO LICENSED CLASS. — In an action against the defendant for the tort of his mine manager, the defendant set up that he was excused from such liability by the provisions of a statute enacting that such managers be hired only from a class licensed by the state. *Held*, that the statute furnishes no defense. *Fulton v. Wilmington, etc., Co.*, 37 Chic. Leg. News 75 (U. S. Circ. Ct., N. D. Ill., 1904).

The law of England has long since been settled in accord with this holding. *Martin v. Temperley*, 4 Q. B. 98. In the United States the few cases that have been found are in conflict. On one side is the present decision, following a previous tendency of the Illinois state courts. *Cf. Consolidated, etc., Co. of St. Louis v. Seniger*, 179 Ill. 370. Squaredly opposed is a Pennsylvania decision, holding a state statute, which expressly attempted to impose the liability contended for in the principal case, unconstitutional. *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193. The decision of the circuit court seems right. The restriction of the employer's choice to a licensed class modifies no factor which led the common law to impute to the master the tort of his servant. Power of control, not latitude of selection, is the criterion of his obligation. The employer's right to supervise, direct, and discharge for disobedience or incompetency remains unbridged. So should his liability.

BANKRUPTCY — DISCHARGE — INTERPRETATION OF STATUTE. — The amendment of 1903 to the Bankruptcy Act of 1898, in amending § 14 b, provides that "The judge shall . . . discharge the applicant unless he has (5) in voluntary proceedings been granted a discharge in bankruptcy within six years." A bankrupt applied for a discharge in involuntary proceedings. It was objected that, as he had been granted a discharge in voluntary proceedings within six years, he could not, under the clause quoted, be granted a discharge in the present proceedings. *Held*, that the objection must be sustained. *Matter of Neely*, 12 Am. B. Rep. 407 (U. S. Dist. Ct., S. D. N. Y.).

As the other clauses in § 14 b apply to present proceedings, both voluntary and involuntary, the fact that the fifth clause begins with the words "in voluntary proceedings" would naturally indicate an intention that those words also should be construed to apply to present rather than to former proceedings. The court's decision seems doubtful also on principle. The recent tendency in America has been to give debtors a discharge whenever their creditors force them into bankruptcy. 18 U. S. Stat. at Large, part 3, c. 390, p. 180. If the creditor gets the benefit of an equal distribution of the assets, it seems just that the debtor should be freed from the handicap of debt,

¹³ *Garrett v. Lister*, 1 Lev. 25; see also *Dyer* 277 b.

¹⁴ *Holmes*, Common Law 344.

¹⁵ The law allowing the executor to take the residue, when not otherwise disposed of, was changed by the St. 11 Geo. 4 and 1 Wm. 4, c. 40.

particularly when he took no part in instituting the present proceedings. The construction contended for would apparently fulfill the object of the amendment in preventing frequent voluntary proceedings quite as well as that adopted by the court. It would therefore seem that an interpretation contrary to the tendency of American legislation and to obvious justice to the debtor should not have been adopted unless warranted by less ambiguous language than that used.

BILLS AND NOTES — ALTERATIONS — LIABILITY OF NEGLIGENT PARTY FOR FRAUDULENT ALTERATIONS. — The plaintiffs signed a check drawn by one of their coexecutors, leaving spaces permitting of easy alteration. The drawer, after presentation, filled in the blank spaces, and the bank paid the check for the raised amount. *Held*, that the bank is not liable for the extra amount of the check thus fraudulently altered. *Marshall v. Colonial Bank of Australia*, 29 Vict. L. Rep. 804.

The Australian court followed *Young v. Grote*, 4 Bing. 253, which, if not overruled in terms, is discredited in England. For a discussion of the principles involved in the case, see 17 HARV. L. REV. 143.

CHAMPERTY AND MAINTENANCE — GENERAL POLICY OF THE MODERN LAW. — The defendant, an attorney, made a contract with a client whereby the defendant was to bring and prosecute, at his own expense, an action by the client against the plaintiff, a physician, for malpractice, and was to receive one third of the amount recovered. The action was brought and resulted in a judgment against the client for costs. The plaintiff then brought this action to recover the attorney's fees and costs incurred in defending the former action, by way of damages for the champerty and maintenance of the defendant's contract with his client, in consequence of which the former suit was brought. *Held*, that the plaintiff cannot recover. *Smits v. Hogan*, 77 Pac. Rep. 390 (Wash.). See NOTES, p. 222.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — EXTRA-TERRITORIAL VALIDITY OF DECREES GRANTED WITHOUT ACTUAL NOTICE TO DEFENDANTS. — A divorce was granted in Missouri after service by publication upon the defendant, a non-resident, who received no actual notice of the institution of the suit. *Held*, that the decree is not valid in New Jersey. *Davenport v. Davenport*, 58 Atl. Rep. 535 (N. J., Ch.). See NOTES, p. 215.

CONFLICT OF LAWS — MARRIAGE — CAPACITY OF PARTIES DECIDED BY LAW OF PLACE OF CELEBRATION. — The statutes of Rhode Island made a guardian's written consent requisite for obtaining a marriage license and also provided that all contracts made by a ward should be void. A Rhode Island man, under guardianship, married a Rhode Island woman in Massachusetts, without the consent of his guardian. *Held*, that, whether a marriage so celebrated in the state would be valid or not, this one, as it was lawfully celebrated in Massachusetts, must be regarded as valid. *Ex parte Chace*, 58 Atl. Rep. 978 (R. I.).

This is a decision of a new jurisdiction on a question on which there is a square conflict of authority. The general rule in this country is that a marriage, valid where celebrated, is valid everywhere, even if it would have been invalid if performed in the domicile of the parties. *Commonwealth v. Lane*, 113 Mass. 458. In England the law formerly was the same. *Dalrymple v. Dalrymple*, 2 Hag. Con. 54. But it is now settled in England that the law of the domicile of the parties determines the capacity to marry. *Sottomayor v. De Barros*, 3 P. D. 1. The English view has some support here, but most of the cases can be brought within the admitted exception that such foreign marriages will not be recognized if against the policy of the law or contrary to good morals. See *Commonwealth v. Lane*, *supra*. The doctrine of the principal case seems preferable to the English view, which is apt frequently to result in marriages being held good in some countries and void in others. Cf. *Brook v. Brook*, 9 H. L. Cas. 193. The American view accords with the earlier cases, and greatly lessens the probability of such disastrous conflicts.

CONFLICT OF LAWS — RIGHTS OF FOREIGN CORPORATIONS — CORPORATIONS FORMED IN ONE STATE TO TRANSACT BUSINESS IN ANOTHER. — A company incorporated under the laws of Kansas was given by its charter no powers other than that of dealing in real estate in Oklahoma. *Held*, that the corporation will not be recognized in Oklahoma. *Myatt v. Ponca City, etc., Co.*, 78 Pac. Rep. 185 (Okla.).

It is the general rule that corporations formed under the laws of one state may carry on business in another. *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519. This rule includes corporations which, though authorized to act in the states in which they are chartered, transact the greater part of their business elsewhere. *Hanna and Fin-*

ley v. International Petroleum Co., 23 Oh. St. 622. Some courts have made no exception in cases in which the corporations were authorized to do nothing in the states by which they were created. *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576. The view taken by the court in the principal case that the doctrine of comity does not require that one state should be given unlimited power to dispose of the franchise of acting as a corporation in another seems sound, however, and is supported by some authority. *Hill v. Beach*, 12 N. J. Eq. 31. It would seem, moreover, that the facts in the case are not essentially different from those upon which a Kansas court has held that a foreign corporation empowered by its charter to act anywhere except in the state of its creation is not entitled to recognition. *Land, etc., Co. v. Commissioners of Coffey County*, 6 Kan. 245.

CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE—GRATUITOUS PASSENGER.—The plaintiff, an infant, was injured through the concurrent negligence of the defendant company and of the driver of the team in which she was riding. *Held*, that the negligence of the driver is not to be imputed to the infant so as to prevent recovery. *Hampel v. Detroit, etc., Ry. Co.*, 100 N. W. Rep. 1002 (Mich.). See NOTES, p. 219.

COSTS—SECURITY FOR COSTS—BOND OF NON-RESIDENT.—A litigant, required to give security for costs, offered the bond of a foreign guaranty company which kept property within the jurisdiction for the sole purpose of securing its liabilities. The court, although admitting the bond was good security, refused it on the ground that as a matter of law a bond of a foreign company could not be accepted. *Held*, that the bond should be accepted, since each case must be decided on its own merits. *Aldrich v. British, etc., Co.*, 53 W. R. 1 (Eng., C. A.).

Although this question does not seem to have arisen often in England, previous decisions have taken the opposite view, that the bond of a non-resident was not good security for costs even though he had property within the jurisdiction. *Knight v. DeBlaquier*, 1 Ir. Eq. 375. In the United States such a question does not often come up, as, by statute in many states, a surety must be a resident. Even where there is no such statutory provision, the same result has been reached on the ground of the difficulty in ascertaining the solvency of the foreign surety, and also in proceeding against him in case of the principal's default. *Snedicor v. Barnett*, 9 Ala. 434. These reasons are valid where the surety has no property within the state; but where he has sufficient assets there to warrant the court in accepting his bond save for the fact that he is a non-resident, there seems to be no good reason for rejecting it under an arbitrary rule of law, as his property may be reached to satisfy any claim. See *Pennoyer v. Neff*, 95 U. S. 714.

COVENANTS RUNNING WITH THE LAND—FENCING—RIGHT TO RECOVER AGAINST ASSIGNEE OF COVENANTOR.—The plaintiff transferred land to a railroad company by a deed in which the latter covenanted to build and maintain fences along the whole extent of the land granted. The railroad company assigned to the defendant, who failed to perform these covenants. The plaintiff sued the defendant for breach of covenant. *Held*, that the plaintiff may recover. *Chicago, etc., Ry. Co. v. McEwen*, 71 N. E. Rep. 926 (Ind., App. Ct.). See NOTES, p. 214.

CRIMINAL LAW—DOUBLE JEOPARDY—CONTINUOUS OFFENSE.—The defendant, who had been convicted and fined for engaging in the business of procuring laborers for employment outside the state without having paid the annual license tax required by law, was indicted in the same year for continuing the offense after the conviction. *Held*, that the conviction is a bar to further prosecution during the current year. *State v. Roberson*, 48 S. E. Rep. 596 (N. C.).

The general rule forbidding double jeopardy, when applied to continuing offenses, is that a conviction is a bar to a subsequent indictment which charges commission of the offense during any time prior to the finding of the first indictment, at least where the first indictment did not charge the offense within specified dates. *People v. Cox*, 107 Mich. 435. This seems fairly to imply that if the offense were continued after conviction it would be again indictable. A few cases hold this directly. *State v. Judge*, 43 La. An. 1119; *Gormley v. State*, 37 Oh. St. 120; see *Dixon v. Corporation of Washington*, 4 Cranch (U. S.) 114. Moreover the principal case seems questionable on principle as well as on authority. The court was doubtless influenced by the fact that the minimum fine equalled the amount of the tax. But it is difficult to see how the punishment of what had been illegal could make the continuance of it legal. A license implies permission from the proper authorities, and the defendant could not legally engage in the business until he had received that permission. Continuing to do so after conviction should have been considered a new offense.

CRIMINAL LAW—DOUBLE JEOPARDY—RIGHT OF STATE TO APPEAL.—The plaintiff in error was tried for embezzlement by a magistrate's court in the Philippine Islands and was acquitted. An act of Congress applying to the islands prohibited double jeopardy. The prosecution sought an appeal on the ground that it was allowed under the Spanish interpretation of double jeopardy. *Held*, that an appeal does not lie. Holmes, J., dissented. *Kepner v. United States*, 24 Sup. Ct. Rep. 797. See NOTES, p. 216.

DAMAGES—EXEMPLARY—PLAINTIFF ENTITLED AS MATTER OF RIGHT.—*Held*, that when the defendant's trespass is willful, wanton, or malicious, it is the jury's duty to assess exemplary damages, since such damages are not merely punitive, but are given in vindication of a private right. *Beaudrot v. Southern Ry. Co.*, 48 S. E. Rep. 106 (S. C.).

Exemplary damages are to be sharply distinguished from damages imposed for the indignity or mental suffering inflicted by a wanton or malicious tort. Courts which deny a right to the former freely accord the latter. *Smith v. Holcomb*, 99 Mass. 552. And where the former are awarded, instructions that they be assessed in addition to the latter are unexceptionable. *Bonelli v. Bowen*, 70 Miss. 142. It would, therefore, seem that exemplary damages, if allowed at all, should be regarded as solely punitive; for the plaintiff's right to be compensated for the aggravating elements of wantonness or malice has already been amply vindicated; and he can accordingly hardly be heard to complain if the imposition of such damages be left to the discretion of the jury. See *Webb v. Gilman*, 80 Me. 177. The South Carolina court itself has held that when exemplary damages are assessable, evidence of the defendant's pecuniary means is admissible,—a position somewhat difficult to reconcile with the theory that these damages are compensatory. *Rowe v. Moses*, 9 Rich. (S. C.) 423. The principal case has since been followed by the same court. See *Poulnot v. The Western Union Telegraph Co.*, 48 S. E. Rep. 622 (S. C.).

ELECTIONS—ILLEGAL VOTES—APPORTIONMENT.—In an election for a county official, the returns from one township indicated the presence of six illegal votes. It was impossible to determine for which of the candidates these votes had been cast. The appellant filed a petition to contest the election. *Held*, that the illegal votes should be apportioned between the candidates in the proportion that the vote of each bears to the whole number of votes cast. *Choisser v. York*, 71 N. E. Rep. 940 (Ill.).

There are three methods of dealing with this question: First, accept the returns without alteration. *Ex parte Murphy*, 7 Cow. (N. Y.) 153. Second, adopt the method of the principal case. *People v. Cicott*, 16 Mich. 283. Third, reject the returns containing illegal ballots, and, if necessary, order a new election. *Attorney General v. McQuade*, 94 Mich. 439. The first view, if followed, would give undue electoral weight to the township from which the illegal returns came in comparison with other townships. The second method would obviate the difficulty of the first by cutting down the vote to its correct numerical basis; but, as between the candidates, where the election is in doubt, the injustice would remain; for a mere apportionment of the illegal votes could not change their relative positions. Under such circumstances the better plan would be to reject the returns and order a new election. This would do justice as between the candidates, carry out the will of the people, and take away the incentive for fraud.

EXECUTORS AND ADMINISTRATORS—RIGHTS, POWERS, AND DUTIES—RIGHT TO REPRESENTATION BY TWO COUNSEL.—*Held*, that where an executor is sued both individually and in his representative capacity, he is entitled to be represented by two counsel. *Roche v. O'Connor*, 95 N. Y. App. Div. 496. See NOTES, p. 224.

EXTRADITION—INTERSTATE EXTRADITION—DEFENSE OF STATUTE OF LIMITATIONS.—The petitioner was held under an extradition warrant for a crime committed five years previously. In *habeas corpus* proceedings it was proved that in the demanding state an indictment must be brought within two years of the commission of the offense, except in the case of persons fleeing from justice. The petitioner had not spent two years in that state since the crime. *Held*, that the prisoner may be extradited, irrespective of the motive with which he left the demanding state. *In re Bruce*, 132 Fed. Rep. 390 (Circ. Ct., Dist. of Md.).

The words "fleeing from justice" in extradition statutes do not require willful or conscious flight. *In re White*, 55 Fed. Rep. 54. There seems little reason for a different reading of similar phraseology in criminal statutes of limitation, since the important fact in either case is that the accused consciously puts himself outside the jurisdiction. Yet the consciousness of flight is generally considered necessary in this

case. *United States v. O'Brian*, 3 Dill. (U. S. C. C.) 381; see *Streep v. United States*, 160 U. S. 128. But upon extradition proceedings the inquiry is mainly whether the defendant is substantially charged with crime and is a fugitive from justice in the sense of the extradition statutes. *Roberts v. Reilly*, 116 U. S. 80. He is substantially charged in the federal court, although the indictment shows that the statute of limitations has run; for the statute constitutes a mere defense of fact for the jury. *United States v. Cook*, 17 Wall. (U. S.) 168. It follows that the accused may only show by this defense in extradition proceedings that he was within the demanding state for the statutory period, and hence did not leave it as a fugitive from justice as that phrase is interpreted in the extradition laws.

HIGHWAYS—RIGHTS AND REMEDIES OF ABUTTERS—ACTION BY SPECIALLY ASSESSED PROPRIETOR.—The plaintiff, a landholder, who had been specially assessed for the repair of a contiguous road, sued the members of the board of local improvements, alleging that they corruptly caused to be laid a pavement inferior to that expressly required by the ordinance, and that the property of the plaintiff was thereby decreased in value. *Held*, that a demurrer to the declaration should be overruled. *Gage v. Springer*, 71 N. E. Rep. 860 (Ill.).

At common law, one cannot recover for a default causing damage similar in kind though different in degree to the public. *Payne v. Partridge*, 1 Salk. 12. In the present case it is admitted that there would ordinarily have been no action, even though the officials, in contravention of an express ministerial duty, had rendered the road impassable; for a badly paved street, however much it might injure the plaintiff, would cause inconvenience and depreciation of property, in some measure, to every one living in the community. The court, however, attempts to derive damage peculiar in kind from the fact of special assessment. Though it is believed that there are no cases in point, this distinction seems untenable. The plaintiff was not complaining of the assessment, but of the faulty pavement, and it matters not how or by whom the expense of the pavement was defrayed; the damage which the plaintiff suffers by having it badly laid, remains precisely the same.

HOMICIDE—SUICIDE—ACCESSORIES BEFORE THE FACT.—A statute provided that in all felonies accessories before the fact should be liable to the same punishment as the principal, and might be prosecuted jointly with the latter, or severally, though the principal had not been taken or tried. *Held*, that an accessory before the fact to a suicide is guilty of murder as a principal in the second degree. *Commonwealth v. Hicks*, 82 S. W. Rep. 265 (Ky.).

The common law conception of suicide as a form of murder is here adopted by the court. For a discussion of the principles involved, see 17 HARV. L. REV. 566.

JOINT WRONGDOERS—JUDGMENT AS TO ONE AND NON-SUIT AS TO ANOTHER.—The plaintiff brought a joint action against a railroad company and its special officer for injuries inflicted by the latter. A non-suit was entered as to the company and a judgment was rendered against the officer. The entry of non-suit was appealed. *Held*, that since the plaintiff has one judgment on the joint action, the judgment of non-suit cannot be reversed. *Higby v. Pennsylvania R. R. Co.*, 209 Pa. St. 453.

An injured party may, at his election, sue joint tort-feasors jointly or severally. *Cabell v. Vaughan*, 1 Wms. Saund. 291 f; *Sessions v. Johnson*, 95 U. S. 347 (*semble*). Logically, once having made his choice, he cannot turn a joint into a several action. Accordingly, in Pennsylvania, a plaintiff, having alleged a joint tort, is not allowed to enter a *nolle prosequi* as to one defendant and recover, as to another, for a several tort. *Wiest v. Electric, etc., Co.*, 200 Pa. St. 148; *cf. Wallace v. Third Avenue R. R. Co.*, 36 N. Y. App. Div. 57. In the principal case the plaintiff elected a joint action and the non-suit could not change its nature. The judgment secured was joint and, on principle, he could not split it by appealing from that part constituted by the non-suit. *Cf. Leese v. Sherwood*, 21 Cal. 151. The court rests its decision on this narrow ground of technical procedure, but modern practice generally allows greater liberality. The action has been considered both joint and several, and so, in New York, a contrary decision was reached. *Hurley v. New York, etc., Co.*, 13 N. Y. App. Div. 167. For purposes of review the action was regarded as severed, and a new trial granted as to one defendant.

JURY—CHALLENGE FOR CAUSE—SERVICE ON FORMER TRIAL.—Two aldermen were successively convicted of receiving bribes, on informations substantially identical. A witness on the first trial had testified to the guilt of the second defendant. The testimony, however, was purely corroborative, nor did it appear that either of the defendants knew of the other's offense. Five of the jurors in the second trial had served on the first, all of whom denied having formed any opinion as to the guilt or

innocence of the defendant. The court overruled the defendant's challenge for cause. *Held*, that the ruling is error. *People v. Mol*, 100 N. W. Rep. 913 (Mich.).

Where the facts sufficiently appear, the cases in which service on a former trial of another defendant has been held ground for disqualification, seem regularly to fall into two classes: (1) where there was participation in the offense; (2) where the verdict in both cases depended on proof of the same material fact. Examples of the first class are a joint assault, bribery of one defendant by the other, and participation by both in the same illegal game. *People v. Troy*, 96 Mich. 530; *Brown v. State*, 104 Ga. 736; *Obenchain v. State*, 35 Tex. Cr. App. 490. An instance of the second class was where both defendants had sold liquor to a person of known intemperate habits. As both sales were admitted, the vendee's reputation became the only fact in issue. *Smith v. State*, 55 Ala. 1. In the principal case there was no participation, and the evidence of the second defendant's guilt was purely corroborative. To raise upon such facts a conclusive presumption of prejudice would seem scarcely necessary. Support is, however, lent the case by a Michigan statute, which, by prohibiting the questioning of jurors concerning their verdict, might render extremely difficult any thorough examination of a juror's professions of impartiality.

JURY — PEREMPTORY CHALLENGES — NUMBER ALLOWED WHEN SEVERAL INDICTMENTS ARE CONSOLIDATED. — A statute provided that "in all . . . cases, civil and criminal, each party shall be entitled to three peremptory challenges." A single defendant was tried on nine indictments concerning the same scheme to defraud, which had been consolidated under a statute. *Held*, that it is error to restrict the defendant to three peremptory challenges. *Betts v. United States*, 132 Fed. Rep. 228 (C. C. A., First Circ.).

Although the rule laid down apparently places the defendant in a better situation than he would have occupied if the trials had been separate, the few decisions upon this statute are favorable to the position of the court. Thus the Supreme Court of the United States has held that when several actions against different defendants are consolidated and tried together, each defendant has three peremptory challenges. *Mutual, etc., Co. v. Hillmon*, 145 U. S. 285. And the Circuit Court of Appeals for the eighth circuit has decided that it is not error to allow a single plaintiff in such a consolidated suit more than three peremptory challenges. *Times Publishing Co. v. Carlisle*, 94 Fed. Rep. 762, 780. The result of these decisions seems to be that a trial of several actions which have been consolidated, is, in substance, not a trial of a single case but of several separate ones, and that the number of challenges should be computed on this basis. As no distinction can be taken under the statute between civil and criminal cases, these adjudications would seem fully to support the present case.

LIMITATION OF ACTIONS — ACCRUAL OF ACTION — CITY WARRANTS. — An Oklahoma statute authorized the levy of a special tax for payment of city warrants. After more than the statutory period had elapsed since the issue of his warrants, the plaintiff brought *mandamus* to compel the city officials to levy the tax. The defendants set up the statute of limitations. *Held*, that the statute does not begin to run on the warrants until the city has provided a fund for their payment, and that the *mandamus* proceedings are consequently not barred. *Barnes v. Turner*, 78 Pac. Rep. 108 (Okla.).

The decision purports to proceed upon the rule that when payment of town warrants is to be made out of a particular fund, the cause of action does not accrue until that fund is provided. This proposition is based upon an interpretation of the city's promise as one to pay when the money is available, and though denied in some jurisdictions, it may possibly be regarded as established. *Lincoln County v. Luning*, 133 U. S. 529; *contra*, *Wilson v. Knox County*, 28 S. W. Rep. 896 (Mo.). In most of the cases, however, it seems a fair inference from facts not always clear that it never rested with the warrant-holder to determine when the fund should be available; for the warrants were payable only out of money derived from the general taxes and appropriated to the special purpose, and the creditor had no remedy on the warrants if the revenues were disbursed in other ways. See *Sawyer v. Colgan*, 102 Cal. 283. In the Oklahoma case the plaintiff could plainly have compelled the provision of the fund at any time by instituting *mandamus* proceedings. *Goldman v. Conway County*, 10 Fed. Rep. 888. The case seems, therefore, a questionable extension of the general principle relied on. See, however, *Davis v. Commissioners of Lincoln County*, 23 Nev. 262.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — STATUTORY LIABILITY: WHAT LAW GOVERNS. — A Montana statute made directors liable for corporation debts if they failed to file an annual report, provided suit was

brought by the creditor within one year after such failure, time not to be counted in favor of a director out of the state. Two years after the plaintiff had acquired a right under this statute against the defendant, who had never been in Montana, a code of civil procedure was passed there, one section of which limited the time for bringing action against directors, even as to rights already accrued, and as against defendants everywhere, to three years. The plaintiff brought suit in Connecticut more than three years after his right had accrued. *Held*, that the Montana statute of limitation applies and the action is barred. *Davis v. Mills*, 194 U. S. 451. See NOTES, p. 220.

MORTGAGES — RIGHTS AND LIABILITIES OF PARTIES — COMPENSATION. — A mortgagee in possession claimed on foreclosure a commission of five per cent of the rents as compensation for his services in collecting them and caring for the estate. *Held*, that he is not entitled to compensation. *Barnard v. Paterson*, 100 N. W. Rep. 893 (Mich.).

The English courts early established the policy that no trustee is entitled to a collateral advantage as compensation. *Ayliffe v. Murray*, 2 Atk. 58. This included a mortgagee in possession, since, in so far as he is not holding as trustee for another, he is holding for himself as a money-lender, and so is zealously deprived of chances for usury and oppression. Accordingly equity, in its abundant sympathy for the mortgagor, refused to enforce an express agreement for compensation. *French v. Baron*, 2 Atk. 120. But the mortgagee may reasonably employ an agent at the expense of the mortgagor. *Bonithon v. Hochmore*, 1 Vern. 316. This shows the services themselves are valuable and legitimate. In the United States it is quite generally agreed by statute or otherwise that, in the interests of efficient management, a fiduciary should receive compensation. *Barney v. Saunders*, 16 How. (U. S.) 535, 542. Several states that reach this result without statute apply the same policy to the legitimate services of the mortgagee, under close scrutiny to avoid oppression. *Gibson v. Crehore*, 5 Pick. (Mass.) 146. This is in accordance with modern conceptions, but the weight of authority is with the principal case. *Blunt v. Syms*, 40 Hun (N. Y.) 566.

PAROL EVIDENCE RULE — CONSTRUCTION OF INSTRUMENT — RULE APPLIED TO THIRD PARTIES. — A furnace company contracted in writing with the defendants for reduced freight rates on the product of "two blast furnaces." The company had in fact only one furnace. The plaintiff, in an action to recover for excessive freight charges of the defendants, sought to introduce evidence tending to show that one of the two furnaces referred to in the contract was a furnace operated by him, and that he was therefore entitled to the benefit of the reduced rates, although his name did not appear in the instrument. *Held*, that the evidence is not admissible. *Thompson v. Erie R. R. Co.*, 96 N. Y. App. Div. 539.

The court felt itself unable to admit the evidence under the rule forbidding the introduction of extrinsic evidence to vary a written instrument. But it is commonly stated that this rule applies only to the parties to the instrument. See *Lowell Manufacturing Co. v. Safeguard Insurance Co.*, 88 N. Y. 591. Accordingly a stranger to a mortgage deed has been allowed to set up an oral agreement between the debtor and the mortgagee. *Jewett v. Sunbach*, 5 S. D. 111. This distinction is reasonable, since it would clearly be unfair to deprive third persons of the right to contradict an instrument merely because the parties who made it are bound by its terms. In the present case, however, the plaintiff, although not mentioned in the agreement nor claiming under it as assignee, is attempting to vary the terms of a contract on which he seeks to hold the defendant liable; and so the case comes well within the reason of the rule which prevents the use of extrinsic evidence to vary what the parties have agreed should be the final memorial of their transaction. See 1 GREENL., EVID., 16th ed., § 305 4.

PATENTS — INFRINGEMENT — SUCCESSIVE CONFLICTING DECISIONS REGARDING THE SAME PATENT IN DIFFERENT CIRCUITS. — *Held*, that in an action for infringement of patent the Circuit Court of the second circuit will follow the Circuit Court of Appeals of the second circuit, notwithstanding a contrary decision of the Circuit Court of Appeals of another circuit on the same facts. *Eldred v. Breitwieser*, 132 Fed. Rep. 251 (Circ. Ct., W. D. N. Y.). See NOTES, p. 217.

RAILROADS — LIABILITY TO TRESPASSERS — CONTRIBUTORY NEGLIGENCE. — The defendant's brakeman, three cars ahead, threw pieces of coal at the plaintiff, who was stealing a ride while the train was in rapid motion. When dodging the coal, the plaintiff let go his hold and was thrown under the wheels. *Held*, that since the plaintiff jumped from the cars voluntarily, the defendant is not liable. *Powell v. Erie R. R. Co.*, 58 Atl. Rep. 930 (N. J., C. A.).

A railroad company is liable if a trespasser is injured by being ejected from a rapidly moving car. *Rounds v. Delaware, etc., R. R. Co.*, 64 N. Y. 129. Whether there is the same liability when the trespasser jumps off in obedience to a peremptory command is apparently in conflict. A judgment for an infant trespasser in such a case will not be disturbed. *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400. And in the case of an adult the same conclusion is reached if the one issuing the command is in a position to enforce it immediately. *Gulf, etc., Ry. Co. v. Kirkbride*, 79 Tex. 457. On the other hand, if threatening commands are given but no actual force can be immediately applied, the defendant is not liable to an adult. *Plantz v. Boston, etc., R. R. Co.*, 157 Mass. 377. The line seems to be drawn on the question of compulsion in fact, for if the plaintiff's act was voluntary he contributes in causing his own damage. *Plantz v. Boston, etc., R. R. Co.*, *supra*. On this principle the present case may be supported; but in concluding from the facts that the plaintiff's act was voluntary the court goes further than in any other case found.

RECEIVERS — INTERFERENCE WITH — FORECLOSING LIEN OBTAINED ON TAX SALE. — Land conveyed to a trustee to secure to the plaintiff the repayment of a loan, was later sold for taxes, and purchased by the person through whom the defendant claims. By statute, land sold for taxes might be redeemed within two years. If it was not redeemed, the purchaser might get a deed from the court after the expiration of this period, but if he failed to procure it during the third year, the right of redemption revived, existing until the deed was obtained. Six years after the sale, a receiver was appointed in a federal court for the plaintiff corporation, and one year after this appointment, the defendant obtained his deed from the state court. *Held*, that a decree should issue from the former court declaring the tax deed void, but ascertaining a prior lien in favor of the defendant. *Johnson v. Southern, etc., Association*, 132 Fed. Rep. 540 (Circ. Ct., W. D. Va.).

The defendant, having paid the consideration, holds an equitable title to the land, the legal title to which is in the state auditor. Since, under the statute, the plaintiff may redeem by reimbursing the purchaser, he stands in the relation of a mortgagor of the latter's equitable title. The obtaining of a deed from the state court by the purchaser destroys the plaintiff's equity of redemption. But the possession of a receiver is the possession of the court; the property is a fund in court, and if there is to be a change in the receiver's property rights, it should be through his administration. *Wiswall v. Sampson*, 14 How. (U. S.) 52. Because of this principle, liens and mortgages may not, by the prevailing authority, be foreclosed after the appointment of a receiver, but must await adjustment by him. *Wallings v. Miller*, 108 N. Y. 173; *Phelps v. Sellick*, Fed. Cas. No. 11,079. In the present case, the state court has cut off a property right which was entrusted to the receiver; and the existence of the principle mentioned, which seems founded in necessity, accounts for the apparently harsh decision. But see *Preston v. Loughran*, 58 Hun (N. Y.) 210.

RECORDING AND REGISTRY LAWS — NOTICE BY RECORD — POSSESSION OF TENANT IN COMMON AS CONSTRUCTIVE NOTICE OF UNRECORDED CONVEYANCE FROM CO-TENANT. — *Held*, that the possession of one tenant in common is constructive notice of a title acquired by him from a co-tenant as against the latter's judgment creditor, though the conveyance was not recorded. *Collum v. Sanger Bros.*, 82 S. W. Rep. 459 (Tex., Sup. Ct.). See NOTES, p. 218.

RULE AGAINST PERPETUITIES — TIME OF VESTING AND NOT THE DURATION OF THE ESTATE THE TEST. — A testator left his residuary estate in trust to A for life, remainder to several grandchildren for life, with remainders to their children. The grandchildren were born after the death of the testator and before the death of A. *Held*, that the life estates to the grandchildren are valid, but that the remainders over are void. *Graham v. Whitridge*, 57 Atl. Rep. 609 (Md.).

In many former cases Maryland considered that the rule against perpetuities condemned any trust that might last longer than lives in being and twenty-one years thereafter, on the ground that the disposal of the whole estate should not be so long suspended. *Barnum v. Barnum*, 26 Md. 119. This confounded two distinct rules of law; that estates cannot be made inalienable, and that future estates may not be created after a fixed limit. The court failed to see that an equitable fee is a present and not a future estate and is not less alienable than a legal fee. See GRAY, PERPETUITIES § 236. The principal case brings Maryland into line with all the authorities in regarding the time of vesting and not the time of ending of estates as the test. The remainders to the children of unborn grandchildren are clearly void under either test. The life estates would be void under the old test of duration, as part of a trust ex-

tending beyond lives in being and twenty-one years. *Lee v. O'Donnell*, 95 Md. 538. But because they must vest, if at all, within the legal period, the court correctly holds them good. *Otis v. McLellan*, 13 Allen (Mass.) 339.

SALES—RIGHTS AND REMEDIES OF BUYERS—DUTY TO FURNISH CARS.—The plaintiff sued on an executory contract for the sale of lumber, to be delivered f. o. b. cars at the defendant's place of business. The vendor set up in defense that the plaintiff should have furnished the cars. *Held*, that this is the duty of the seller, and is not a condition precedent to be performed by the buyer. *Vogt v. Shienebeck*, 100 N. W. Rep. 820 (Wis.).

It is clear that where a contract provides for the delivery of goods f. o. b. cars, it is the seller's duty to load the goods upon them, and to assume all trouble and expense incidental to such loading. *Sheffield Furnace Co. v. Hull, etc., Co.*, 101 Ala. 446. The Wisconsin court argues that supplying cars is but a means to the end which the seller must accomplish. It is well established that where the delivery is to be f. o. b. a ship, the buyer must name and furnish the ship; and by analogy some courts have required the buyer to furnish cars. See *Armitage v. Insole*, 14 Q. B. 728; *Hocking v. Hamilton*, 158 Pa. St. 107. This rule proceeds upon the theory that as the buyer is to pay the freight, he is the one to make all arrangements for the carriage of the goods. Ordinarily to-day, however, where transportation is to be by rail, this circumstance has little force; for rates are generally uniform, and often, as in the principal case, shipment is possible over only one railroad. The Wisconsin rule seems, therefore, thoroughly consistent with modern business conditions. See *Cincinnati, etc., R. R. Co. v. Consolidated, etc., Co.*, 7 W. L. Bul. 200.

STATUTES—AMENDMENTS—EFFECT ON ACT PREVIOUSLY AMENDED.—In 1901 an act amendatory of certain sections of a statute which had previously been "amended to read as follows," was passed. The act of 1901 made no reference to the previous amendment. *Held*, that the act is valid. *Village of Melrose Park v. Dunnebecke*, 71 N. E. Rep. 431 (Ill.).

This decision is important as overruling an earlier Illinois case, and settling the law of that state in accord with the great weight of authority. *Cf. Louisville, etc., R. R. Co. v. City of East St. Louis*, 134 Ill. 656; *Columbia Wire Co. v. Boyce*, 104 Fed. Rep. 172. It is argued by the opponents of this position that where a section of a statute is amended, it ceases to exist, and therefore cannot be the subject of further legislation by amendment. *Feibleman v. State*, 98 Ind. 516. This reasoning, however, seems too refined for practical value. While in theory the amended act no longer exists, in reality it retains its place upon the statute book. A reference to it would, therefore, seem sufficient as clearly showing the intention of the legislature that the present enactment should take the place of the previous act as amended. *Commonwealth v. Kenneson*, 143 Mass. 418.

TAXATION—FRANCHISE TAX.—A statute of New York which went into effect Oct. 1, 1901, relating "to franchise taxes of insurance companies," provided for an annual state tax upon life insurance companies equal to one per cent on the gross amount of premiums received during the preceding calendar year for business done in the state. *Held*, that since this tax is imposed "for the privilege of exercising corporate franchises," it can be laid only upon such business as depended upon the exercise of such franchises after the passing of the statute; and since the collection of premiums upon contracts of insurance already made is not the exercise of a franchise, but depends upon an absolute contract right, premiums received upon contracts of insurance entered into before Oct. 1, 1901, cannot be taken as part of that gross amount of premiums upon which the tax is imposed. *People ex rel. The Provident, etc., Society v. Miller*, 32 N. Y. L. J. 303 (N. Y., Ct. of App., Oct. 18, 1904).

The rule laid down that the franchise tax can be imposed only upon such business as depends upon the exercise of the franchise is novel. A franchise tax is not a tax on business done; it is a tax on the value of the franchise. *People v. Home Insurance Co.*, 92 N. Y. 328. The cases hold that it is necessary only that the method of taxation employed furnish a fair basis by which to estimate this value. *Connecticut Insurance Co. v. Commonwealth*, 133 Mass. 161. The total amount of business done is considered a fair measure, but so, also, is the market value of the stock. *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Hamilton Company v. Massachusetts*, 6 Wall. (U. S.) 632. But granting the correctness of the holding as to what this tax reaches, it is difficult to understand the ruling that the collection of premiums upon contracts already entered into is not the exercise of a corporate franchise. It would seem axiomatic that every act of a corporation within its powers is an exercise of a corporate franchise. It is submitted, therefore, that the decision is erroneous. *Cf. Patterson, etc., Co. v. State Board of Assessors*, 69 N. J. Law 116.

TELEGRAPH COMPANIES — LIABILITY TO ADDRESSEE — DELAY OR NON-DELIVERY. — *Seible*, that where the contract between the sender of a telegram and the telegraph company is made for the benefit of the addressee he may maintain an action against the company for neglect to deliver. *Frazier v. Western Union Telegraph Company*, 78 Pac. Rep. 330 (Ore.).

Whether a telegraph company owes to the addressee of a message any duty to transmit and deliver carefully is a question that has been argued in the courts of many states with little uniformity of result. The above case apparently furnishes the first indication of Oregon's attitude. For a discussion of the principles involved, see 17 HARV. L. REV. 365.

TRADE MARKS AND TRADE NAMES — MARKS AND NAMES SUBJECT OF OWNERSHIP — GEOGRAPHICAL NAMES. — The defendants entered the jewelry business in Iowa City under the name "Elgin Jewelry Company." The plaintiff, the Elgin National Watch Co. of Elgin, brought a bill to enjoin the defendants from using the word "Elgin" in connection with the jewelry business. *Held*, that through the plaintiff's use of the word "Elgin," in connection with the jewelry business, it has acquired such a secondary meaning as to enable the plaintiff to assert an exclusive right thereto against any one not carrying on that business in good faith at the same geographical location. *Elgin, etc., Co. v. Loveland*, 132 Fed. Rep. 41 (Circ. Ct., N. D. Ia.).

For a discussion of the principles involved, see 18 HARV. L. REV. 56.

USES — STATUTE OF USES — APPLIED TO PERSONALTY. — A devised the residue of his estate, real and personal, to trustees and their successors on trust to pay the income to B for life, and after her death to hold for such of A's descendants as B should by will appoint; and on default of appointment to hold for others. B duly appointed the estate to several persons for life, and the remainders went as on default. *Held*, that the life estates and the remainders are legal and not equitable estates. *Graham v. Whitridge*, 58 Atl. Rep. 36 (Md.).

The court says the original trust became passive on the death of B and was executed by the Statute of Uses. This application of the statute to personality is technically wrong, because the grantor is not "seized" of it, and is contrary to the weight of authority. *Williams v. McConico*, 36 Ala. 22. But without noticing this, courts have sometimes applied the statute to an estate composed of both realty and personality where the trustee's active duties ceased with the life estate. *Doe d. White v. Simpson*, 5 East 162. The result may be supported if the court can find an expressed intention to give the trustees a legal estate for only a limited period, with legal remainders over; and there is some evidence of this intention in the fact that the donor reached this result as to his realty and purported to treat his personality in the same way. But this is solely a matter of construction and seems to be ineffective in the principal case in the face of an express requirement that the trustees continue to hold either for the purposes of the appointment or on default of appointment.

WATER AND WATERCOURSES — NATURAL WATERCOURSES — RIPARIAN RIGHT TO NATURAL FLOW. — The defendant, a riparian proprietor opposite the plaintiff, maintained a dam extending more than half-way across the river. This obstructed the flow sufficiently to enable the defendant thereby to irrigate his own land; but it did no appreciable damage to the plaintiff, who brought suit for interference with her right to have the waters flow by her premises in their natural condition. *Held*, that as the defendant has not "sensibly diminished, obstructed nor diverted" the stream, he is not liable. *Nagle v. Miller*, 29 Vict. L. Rep. 765.

In arriving at this conclusion the Victorian court purports to recognize the English rule, that any permanent encroachment on the bed of a running stream sufficient sensibly to interfere with the natural flow thereof, is ground for complaint on the part of any riparian owner who is sensibly injured thereby, without proof that actual damage has been or will be sustained. *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *The Earl of Norbury v. Kitchen*, 15 L. T. Rep. N. S. 501. In America the general rule is that no action lies without proof of actual damage. *Norway Plains Co. v. Bradley*, 52 N. H. 86; *Sealey v. Brush*, 35 Conn. 419. There can be little doubt that the American rule is better adapted to the needs and requirements of a new country in order to encourage the development of its natural resources. The conclusion, therefore, is eminently warranted, though it could hardly have been reached by following the English rule. In supporting its view, the court has construed the finding of fact that the plaintiff had suffered "no appreciable damage" to mean "no sensible injury," and thereby has made an easy transition from the English to the American doctrine.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — PRODUCTION OF DOCUMENTS. — The defendant was ordered to produce, for the purpose of refreshing

his recollection at an examination before trial, the books of a corporation of which he was treasurer. He refused to obey the order on the ground that so doing would incriminate him. *Held*, that the defendant is guilty of contempt of court. *Pray v. Blanchard Co.*, 95 N. Y. App. Div. 423.

The decision was based upon the grounds that the defendant could assert his alleged privilege only by appealing from the order, and that the mere production of the books for the purpose of refreshing his recollection could not of itself tend to incriminate him. The second ground seems to have been well taken. The rule that a witness need not furnish evidence against himself is of long standing. *East India Co. v. Campbell*, 1 Ves. 246. And the production of documents to be used in evidence is within the privilege. *Boyd v. United States*, 116 U. S. 616. In the principal case, however, the books were, by the terms of the order, to be used merely for the purpose of refreshing the recollection of the witness. It seems clear that a court has power to make such an order. *Chapin v. Lapham*, 20 Pick. (Mass.) 467. If, upon the examination, questions should be put to the defendant the answers to which would tend to incriminate him, he could then assert his privilege. The mere production of documents does not make them evidence. *Merrill v. Merrill*, 67 Me. 70.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

POWER OF STATE COURT OVER RECEIVER APPOINTED BY FEDERAL COURT.—The old English rule that a receiver could not be sued without the leave of the court appointing him caused much injustice, when courts, usually federal, began to use such officials in this country to take charge of large corporations. Small claimants were practically without legal redress against corporations so managed. To remedy this, Congress, in March, 1887, enacted that receivers appointed by any United States court may be sued in respect of anything done in carrying on the business, without the previous leave of the appointing court; provided, however, that such suit shall be subject to the general equity jurisdiction of the appointing court, "so far as the same may be necessary to the ends of justice." Some points as yet unsettled under this law are treated in an interesting recent article in the Central Law Journal. *Has a State Court Jurisdiction to Issue an Injunction Against a Receiver Appointed by a Federal Court?* by W. A. Coutts, 59 Cent. L. J. 382 (Nov. 11, 1904). The writer first discusses whether a state court in which suit has been brought has jurisdiction to levy execution for the enforcement of its judgments. Conceding the federal court's authority to intervene if justice demands, it is nevertheless contended that the conferring of jurisdiction to sue gave the state court jurisdiction to enforce judgment by its own independent process. It is argued that there are only *dicta* against this, and *In re Tyler* (149 U. S. 164), which has been regarded as deciding the point, is distinguished as within the clause authorizing interference so far as "necessary," even if proceedings under a tax warrant come within the meaning of "suit" in the act of Congress, which is doubted.

Mr. Coutts's view on this matter seems hardly likely to prevail, however. Where there is no statute dispensing with the need of leave to sue in another court and such permission is granted, process may not issue from that other court, for it is for the appointing court to settle the time and manner of satisfying the judgment. *Harding v. Nettleton*, 86 Mo. 658. Confusion would seem to be avoided and the end of the act giving leave to sue attained by the observance of the same rule.

If power to issue process is denied to the state court Mr. Coutts still maintains that it may have authority to issue injunctions against receivers. Levy and sale under process, he admits, affect property, and creditors may have a right to a *pro rata* distribution of the proceeds, requiring control by the appointing

court. No such reason, he says, demands control of an injunction, which operates in *personam*. In proper cases it would not infringe any rights represented by the receiver, and a state court is as competent to pass on the propriety of it as a federal court. Mr. Coutts admits, however, that the three state court decisions in favor of his view do not give the subject the consideration it deserves. A Michigan case is opposed, and it may well be doubted if the Supreme Court of the United States will decide that the act was intended to give such power.

FOREIGN JUDGMENTS AS EVIDENCE OF THE RIGHTS FOUNDED UPON THEM. — A recent article in the Columbia Law Review contains a concise and scholarly summary of a large subject. *History of the Adoption of Section I. of Article IV. of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, by George P. Costigan, Jr., 4 Columbia L. Rev. 470 (Nov. 1904). That well-known section, enlarging upon a provision in the Articles of Confederation, provides that "full faith and credit" shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that Congress shall prescribe the method of proof and the effect thereof. Congress at once exceeded the authority here given by exercising, in connection with it, the right given by the Constitution to legislate in aid of the general judicial power. For the acts of 1790 and of 1804, since incorporated in the Revised Statutes (sec. 905), gave to judgments by courts of the territories and possessions, as well as of the states, "full faith and credit" in every court "within the United States." Mr. Costigan notes that judicial legislation completed the circle by securing a like recognition throughout the land for judgments of the federal courts.

While most foreign judgments seem to have been merely *prima facie* evidence of matters properly adjudicated, the Constitution made sister-state judgments conclusive evidence, open only to the defense of lack of jurisdiction and to such other defenses as could be brought against them where they were rendered. The writer believes that the constitutional provision is self-executing without the statutes, and that, upon a demurrer to a complaint which alleges a sister-state judgment but does not authenticate it as required by statute, the question may yet come before the Supreme Court. Other points discussed are the application of those enactments to judgments of justices of the peace and to state judgments sued upon in courts of the Philippine Islands, for example, which are perhaps not literally "within the United States."

In contrasting the treatment of foreign and of sister-state judgments Mr. Costigan seems to take a position regarding comity that may be open to misunderstanding. Citing *Hilton v. Guyot* (159 U. S. 113), he says that "what comity sustains, unfriendliness can take away," and that "comity does not require us to do more by others than they do by us." It seems the better opinion that the admission to-day of many foreign judgments as conclusive evidence is based not upon courtesy but upon law justified by our own convenience. DICEY, *CONFLICT OF LAWS* 10. Since the business of the courts is merely to enforce the common law of which comity has thus become a recognized part, they may have no regard for their own kindly or unkindly feelings toward a foreign state. *The Nereide*, 9 Cranch (U. S.) 388, 422. It is only by legislation that foreign judgments may be deprived of the right they now enjoy under the principle of comity.

RESCISSION BY PAROL AGREEMENT. — The same number of the Columbia Law Review contains an instructive article in text-book style by Professor Williston. *Rescission by Parol Agreement*, 4 Columbia L. Rev. 455. The discussion is concerned with the incidents and effect of a parol agreement to rescind, and is based on the proposition that such an agreement, in order to

effectuate its purpose must possess all the requisites of a binding contract. The subject is divided into three parts: in the first of these the primary proposition is laid down, with a statement of the exceptions which have been recognized by some courts when a unilateral contract is concerned; in the second the application of the doctrine to written contracts is examined, with especial reference to the effect of a subsequent contract covering the same subject matter; and the effect of a parol agreement to discharge an obligation under seal occupies the third part.

In explaining his primary rule, the writer makes the statement that an agreement to rescind an executory bilateral contract, whether made before or after breach, is valid, because the promise of one party to give up his rights is consideration for the like promise by the other. Such a proposition would seem to need qualification, for, in the case of an agreement entered into after a material breach, it is hard to perceive what consideration is given by the party in default. His right against the other, if it may be correctly termed a right, is unenforceable because of his own material breach; and of course the surrender of an unenforceable right is neither a detriment to the promisor nor a benefit to the promisee.

CANADIAN COPYRIGHT IN ITS CONSTITUTIONAL AND LEGAL ASPECTS. II. *A. R. Clute*. 24 Can. L. T. 347.

COMPARATIVE ROMAN LAW. Part I. *James Williams*. 30 L. Mag. & Rev. 70.

CONGO STATE, THE; A REVIEW OF THE INTERNATIONAL POSITION. *G. G. Phillimore*. A review of the controversy between the British government and that of the Congo State as to deficiencies in the method of administration in the Congo State. 29 L. Mag. & Rev. 385.

CONTROL OF PUBLIC UTILITIES, THE. *William H. Bailey*. Discussing the regulation of rates by a city council under authority delegated by the legislature. 12 Am. Law. 444.

CROWN AS CORPORATION, THE. *W. Harrison Moore*. 20 L. Quar. Rev. 351.

DOCTRINE OF WAIVER, THE. *Colin P. Campbell*. Laying down a general rule, and contending that a waiver requires a consideration or facts equivalent to an estoppel to support it. 3 Mich. L. Rev. 9.

EQUITABLE DOCTRINE OF MARSHALLING THE ASSETS OF A DECEDENT'S ESTATE FOR THE PAYMENT OF DEBTS, THE. *C. B. Garnett*. 11 Va. L. Reg. 175. See NOTES, p. 221.

EXCLUSIVE POWER OF CONGRESS TO REGULATE INTERSTATE AND FOREIGN COMMERCE, THE. *David Walter Brown*. 4 Columbia L. Rev. 490.

FEDERAL COMMON LAW. *Hudson Cary*. Contending that there is a federal common law as distinguished from the common law of the various states. 10 Va. L. Reg. 475.

FIRE INSURANCE AS AN INDEMNITY CONTRACT. *Roy Elias Ressler*. 59 Cent. L. J. 364.

FREE CHURCH CASE, THE. *R. M. Williamson*. Supporting the recent decision of the House of Lords. 20 L. Quar. Rev. 415.

GAMBLING AND COGNATE VICES. *John R. Dos Passos*. Contending that such vices are merely *mala prohibita*, and advocating less harsh laws respecting them. 14 Yale L. J. 9.

HAS A STATE COURT JURISDICTION TO ISSUE AN INJUNCTION AGAINST A RECEIVER APPOINTED BY A FEDERAL COURT? *W. A. Coutts*. 59 Cent. L. J. 382. See *supra*.

HISTORY OF THE ADOPTION OF SEC. I. OF ART. IV. OF THE U. S. CONSTITUTION, AND A CONSIDERATION OF THE EFFECT ON JUDGMENTS OF THAT SECTION AND OF FEDERAL LEGISLATION. *Geo. P. Costigan, Jr.* 4 Columbia L. Rev. 470. See *supra*.

INJURIES OCCASIONED BY THIRD PERSONS. *G. S. Holmsted*. Pointing out some apparently contradictory propositions found in the authorities. 40 Can. L. J. 769.

JUDGE-MADE LAW. *A. H. F. Lefroy*. Suggesting certain lines along which, according to the writer, judges make, rather than interpret law. 20 L. Quar. Rev. 399.

LAND TRANSFER QUESTION, THE. *W. Strachan*. Suggesting a revised system of registration of title. 20 L. Quar. Rev. 427.

LIABILITY OF A MANUFACTURER FOR INJURIES TO THIRD PERSONS FROM IMPROPERLY CONSTRUCTED ARTICLES, THE. *Glenda Burke Slaymaker*. 59 Cent. L. J. 324.

- LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENCE IN TRANSMISSION OR DELIVERY OF MESSAGES, THE. III. and IV. *Graham B. Smedley*. 10 Va. L. Reg. 507.
- LOANS FOR THE MAKING OR PAYMENT OF WAGERS. *A. V. Dicey*. A brief article to the effect that such loans do not come within the terms of the Gaming Act, 1892. 20 L. Quar. Rev. 436.
- MASSACHUSETTS PROPOSITION FOR AN EMPLOYERS' COMPENSATION ACT, THE. *Epaphroditus Peck*. Showing the present unsatisfactory state of the law, and approving the Massachusetts proposition. 14 Yale L. J. 18.
- MAY A MURDERER PROFIT BY HIS CRIME? *L. P. M.* Considering the question whether a murderer can succeed to the property of the deceased to which, except for the crime, he would be entitled. 1 N. C. J. of L. 532.
- MORAL CONSIDERATION IN PENNSYLVANIA. I. *Joseph P. M. Keehan*. 9 Dickinson Forum 1.
- MORTGAGES OF MOVEABLES. *Anon.* Discussing briefly the state of the Indian law on the subject, and the need of legislation. 6 Bombay L. Rep. 193.
- MUNICIPAL CORPORATIONS. *Theodore D. Gottlieb*. An historical sketch of the origin and development of municipal corporations. 27 N. J. L. J. 325.
- NEUTRALITY OF GREAT BRITAIN, THE: THE FOREIGN ENLISTMENT ACT, 1870. *N. W. Sibley*. 29 L. Mag. & Rev. 454.
- NOTICE, CONDITION, AND DECLARATION.—THE DOMINION RAILWAY ACT, SEC. 246. *A. Rives Hall*. Arguing for an interpretation that will prevent railroads from contracting so as to relieve themselves from liability for negligence. 3 Can. L. Rev. 495.
- PRACTICAL QUESTION IN THE LAW OF FRAUDULENT CONVEYANCES, A. *Linton D. Landrum*. Showing error of the construction of recording acts which holds unrecorded conveyances void only as to lien creditors; and finding for other creditors without notice relief in equity on grounds of fraud and estoppel. 59 Cent. L. J. 344.
- PUTTING IN ONE'S OWN CASE ON CROSS-EXAMINATION. *John H. Wigmore*. An examination of the different rules upon the question with a strong condemnation of the so-called "federal rule" which confines the cross-examination to matters brought out in the direct examination. 14 Yale L. J. 26.
- RECENT CASES AS TO WINDING UP ORDERS. *C. S. MacInnes*. 40 Can. L. J. 726.
- RECONSTRUCTION OF COMPANIES. *Frank Evans*. Defining reconstruction and suggesting modes of accomplishing it. 20 L. Quar. Rev. 392.
- RESCISSION BY PAROL AGREEMENT. *Samuel Williston*. 4 Columbia L. Rev. 455. See *supra*.
- RIGHT TO RETAIN AN ADVOCATE, THE. *Edward S. Cox-Sinclair*. Discussing the right of an advocate to refuse upon some personal ground to appear on behalf of a litigant. 29 L. Mag. & Rev. 406.
- RUSSIAN RAIDS ON NEUTRAL COMMERCE. *Edwin Maxey*. Showing that by the weight of authority food-stuffs are not contraband of war. 3 Mich. L. Rev. 1.
- SALES UNDER DEEDS OF TRUST. *E. R. F. Wells*. Discussing the rights of *bona fide* purchasers at unauthorized sales. 10 Va. L. Reg. 491.
- SUBROGATION. *K. S. Ramaswami Sastry*. A discussion of the law of India as to subrogation by operation of law. 3 Madras Leg. Comp. 39.
- SURRENDER. *Herbert Thorndike Tiffany*. A full treatment of the subject. 3 Mich. L. Rev. 18.
- SWEDISH LAWBOOK OF 1734, THE: AN EARLY GERMANIC CODIFICATION. *Wilhelm Chydenius*. Discussing the provisions of the code on which is based the civil law of Sweden. 20 L. Quar. Rev. 377.
- TOPICS OF MALABAR LAW.—TEMPLES. *Anon.* Classifying temples and discussing public interference with so-called "private" temples, when their property is not well administered. 14 Madras L. J. 195.

II. BOOK REVIEWS.

HANDBOOK OF THE LAW OF INSURANCE. By William Reynolds Vance. St. Paul, Minn.: West Publishing Co., 1904. pp. xiv, 683. 8vo.

This is a subject upon which recent books have not been very good. The present volume is better than its immediate predecessors; and as it seems likely to prove popular, a few suggestions are offered toward increasing the usefulness of future editions.

On p. 6 it would have been well to state clearly that the Laws of Oleron and of Wisbuy throw no light on insurance, and to guard against a misunderstanding of the date of the *Guidon de la Mer*,—which was written, as the best authorities think, between 1556 and 1600,—and to mention Santerna de *Asssecurationibus* (1552) and Straccha de *Asssecurationibus* (1569).

On p. 7 it is said that "The first reported appearance of any question involving insurance in the common law of England occurred . . . (1546) in the case of *Crane v. Bell*." Doubtless this statement rests upon what is said by BRADLEY, J., in *Insurance Co. v. Durham* (11 Wall. [U. S.] 1, 34), and originally upon a statement in 4 Co. Inst. 139. It is now known, however, that *Crane v. Bell* was in no way connected with insurance. 6 Selden Soc. Pub. lxviii, 129, 229; 11 *id.* xlix.

On p. 8 it is said: "The first reported insurance case heard before a common law court is Dowdale's Case, which was decided in 1589," citing 6 Co. Rep. 47 b. Dowdale's Case (6 Co. Rep. 46 b) was decided in 1605, and had nothing to do with insurance; but at p. 47 b it cites Anonymous, (M. 30 & 31 Eliz.) (1588), which is also stated in 4 Co. Inst. 142, and which is certainly one of the earliest insurance cases mentioned in the ordinary reports.

It seems unnecessary to comment further upon the historical part of the volume. For practical purposes the history of insurance need not go beyond the fact, brought out clearly in this treatise, that the subject is of Continental origin, closely connected with maritime law, and only within the last three hundred years the source of much litigation in the ordinary courts; and hence the author did simply what most authors do when he took his history from scanty and inaccurate secondary sources.

It is only just that a book intended chiefly for use in practice should be tested almost exclusively by the accuracy and fullness of its statements of law. On p. 50 it is said that "From the fact that the contract of fire insurance is peculiarly personal, the result follows that rights under it, so long as it remains executory, cannot be assigned by one party without the consent of the other." This is inaccurate; but the author doubtless is thinking not of assignment but of a sort of novation—the substitution of the interest of a new person as the subject matter of the policy. The distinction is explained in *Wilson v. Hill* (3 Met. [Mass.] 66), *Fogg v. Middlesex Mutual F. Ins. Co.* (10 Cush. [Mass.] 337), and *Cummings v. Cheshire County Mutual F. Ins. Co.* (55 N. H. 457), besides being involved in some of the cases cited in the author's foot-notes.

On pp. 286-287, it is well said that "in order to constitute a stipulation a warranty, however, it must not only be clearly shown that the parties intended it as such, but it must also form a part of the contract itself. . . . Mere reference, alone, is not sufficient." It seems that such general statements can be of slight use unless illustrated by instances which have been held to create warranties, or the reverse; but the reader has been left to find such illustrations for himself by examining cases cited in the foot-notes.

The following appears on p. 289: "The untruth of an affirmative warranty will prevent the insured from ever acquiring any rights in the policy. . . . A promissory warranty, however, . . . is in the nature of a subsequent condition of defeasance, the non-fulfillment of which renders the policy voidable." Yet the breach of an affirmative warranty also simply makes the policy voidable, for this breach can be waived, just as can the breach *ab initio* of an express condition.

On p. 425, note, the author, discussing *Castellain v. Preston* (11 Q. B. D. 380), says that in *Foley v. Manufacturers' and Builders' F. Ins. Co.* (152 N. Y.

131) "an insurer was denied subrogation under facts practically identical." This is hardly correct, as the latter case raised a question not of subrogation but simply of amount of recovery; but the mistake is rendered almost innocuous by the author's full statement of each case.

The author, although explaining clearly on p. 434 the fatal objection to the view of a minority of the cases that a breach of condition simply suspends the policy, fails to point out that many of these cases rely upon *New England F. & M. Ins. Co. v. Wetmore* (32 Ill. 221), where the condition distinctly called for mere suspension.

On pp. 483-486 the presentation of the amount of recovery in fire insurance is entirely inadequate, although the deficiency is partly supplied by the discussion of insurable interest in Chapter IV.

Yet it is not desirable that there should go abroad the impression that this book bristles with defects. Notwithstanding the shortcomings pointed out, and others of the same sort, this book, as has been said, is superior to most of the recent writing upon insurance. The discussion of duration of interest, on pp. 121-124, is distinctly good; and Chapter X., on waiver and estoppel, shows that the author can do unusually useful work when he reads the cases carefully and expresses his own conclusions.

A POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD.

By Jeremiah Simeon Young. Chicago: The University of Chicago Press. 1904. pp. 107. 8vo.

The Cumberland Road was under construction by the federal government for the fifty years from 1806 to 1856, during which time it was built from Cumberland, Md., to Vandalia, Ill., for a distance of about six hundred miles, and at a cost of nearly \$7,000,000. Though Mr. Young has sketched the early history of the road and has indicated its importance as a factor in the growth and unification of our country, that portion of his monograph chiefly interests us which discusses it as the center of the struggle over the constitutionality of national internal improvements. Three phases of the greater question were involved, — the power to appropriate, the power to construct, and the right of jurisdiction over the road when once constructed. The primary difficulty of appropriating from the treasury for such a purpose was at first avoided by means of a compact with each new state. Two per cent of the proceeds from the sale of public lands within the state were to constitute a fund to be expended under the direction of the President for roads to and through the state, the latter promising in return to exempt from taxation for five years the lands sold under the compact. On the basis of this fund, as the road progressed, so-called advances were made, ultimately amounting to many times the fund itself. The fiction served, however, despite the effort of Congress, under the leadership of Calhoun and Clay, to displace it by the bonus bill, until, in President Monroe's administration, the Executive and Congress arrived at the important conclusion that direct appropriation for improvements of a national character was one of the powers delegated by the general welfare clause of the Constitution.

The other problems were not so easily settled. The construction of the road was from first to last continued only with the consent of the states through which it passed, and the dependence upon that consent somewhat impeded its progress. An issue was squarely raised, however, when it seemed necessary, if the road was to be preserved, for the federal government to erect toll-gates, collect tolls, police the road, and, in short, to exercise jurisdiction over it. The Cumberland Road gate bill of 1822, asserting impliedly the constitutionality of such a step, seems to mark the extreme of congressional opinion in the direction of loose construction. It met a veto from President Monroe, who would go no farther in his liberal interpretation of the general welfare clause, and who could find no other constitutional warrant for the maintenance, for such a purpose, of federal jurisdiction within the states. As the state-rights theory of sovereignty became increasingly a subject of heated controversy, that right of jurisdiction

was not again embodied in congressional legislation prior to the Civil War. The road consequently fell into disrepair. The Western states, the constant advocates of the road and of internal improvements generally, came to realize that in state control lay their only hope. One after another submitted their petitions to Congress, which was only too glad to be rid of its difficulties by surrendering to each state whatever rights, "if any," the national government possessed.

Confining himself largely to the political side of the road's history, the author gives but scant attention to court decisions involved. The result of his investigations on the subject is not a thesis, but an admirably impartial dissertation of considerable interest to the student of political history or of constitutional law.

A TREATISE ON AMERICAN ADVOCACY. Based upon the Standard English Treatise, entitled *Hints on Advocacy*, by Richard Harris. All new matter added being such as conforms peculiarly to American practice, thus making the work more valuable to the practitioner and student of this country than the English edition upon which it is founded, while the best features of the English book have been retained; more than one half of the present volume being new and original matter. Enlarged, completely Revised and Americanized. By Alexander H. Robbins, St. Louis: Central Law Journal Company. 1904. pp. xiv, 295. 8vo.

Successful practice of the law requires at least two things: a knowledge of its rules, and an understanding of human nature. Innumerable books are annually written to aid in the attainment of the first, but the student of the second must go forth into the school of experience for his training. And yet the subtleties of practice which depend largely upon a knowledge of men and motives form no small part of a man's equipment for a profession in which the personal relation takes so prominent a place. To these subtleties of practice Mr. Robbins in his book attempts to give the young lawyer a short cut. The first thirteen chapters deal with the preparations for trials, both civil and criminal, and the conduct of them, the examination of witnesses, and the making of briefs. All this matter is readily accessible, being contained in short sections under appropriate titles. The work aims, perhaps, not so much to fill the place of a text-book on these subjects as to supply suggestions not easily obtainable except by broad experience. This is especially true of the text and notes dealing with the treatment of witnesses. Ideas are there furnished which would not occur to the beginner and which it might be difficult if not impossible for him to find elsewhere.

The last two chapters deal with legal ethics, compensation, and advertising. In venturing upon this delicate ground the author makes no attempt to codify the indefinite rules which must inevitably represent the best practice, but places his readers in the best position to answer these difficult questions for themselves by giving them a full exposition of the relations and duties of the attorney to the court, to his client, to his adversary, to his profession, and to the community in general. The parts taken from Mr. Harris's book have suffered somewhat in condensation, but perhaps this is more than made up for by the better arrangement of the new volume and the considerable addition of material.

THE INTERSTATE COMMERCE ACT and Federal Anti-Trust Laws, including the Sherman Act; the Act Creating the Bureau of Corporations; the Elkins Act; the Act to Expedite Suits in the Federal Courts; Acts Relating to Telegraph, Military, and Post Roads; Acts Affecting Equipment of Cars and Locomotives of Carriers Engaged in Interstate Commerce, with All Amendments. With Comments and Authorities. By William L. Snyder. New York: Baker, Voorhis & Company. 1904. pp. xxiii, 380. 8vo.

This work is valuable chiefly as a convenient collection of the federal statutes concerning interstate commerce, and of the cases bearing upon the effect of

those statutes. Any satisfactory annotation purporting to be more than a mere collection of the cases decided under the statutes must discuss, first, the constitutional powers of the federal government over interstate commerce; second, the rights and liabilities of interstate carriers and traders at common law as affected by the constitution; and finally, the changes in those rights by the federal statutes. Mr. Snyder, while he has apparently attempted to do this, has not been so successful as one might wish in keeping the different elements of the problem distinct. Many of the cases cited under particular sections of the statutes belong in the opening chapter on constitutional provisions as to interstate commerce and their effect, or in a section containing a general discussion of the situation before the enactment of the statutes in question. Furthermore, his statement of the general principles underlying the problem is not always discriminating. For instance, on p. 42 he states, "But until Congress legislates the local law or the statutes of a state upon a subject which may directly or indirectly affect a branch of interstate commerce not covered by a federal statute will prevail." This statement, in so far as it concerns state statutes, must be regarded as true rather of local police regulations affecting commerce only remotely and incidentally than of regulations of interstate commerce as such. *Welton v. Missouri*, 91 U. S. 275. As a whole the book is lacking in logic of arrangement and in breadth of treatment. The author's services are rather those of a collector than of an original contributor to the subject. The book furnishes, however, reasonably full notes on nearly three hundred important decisions, most of them very recent, which are made accessible through a table of cases and an index.

CASES ON RESTRAINT OF INFRINGEMENT OF INCORPOREAL RIGHTS. A collection of Cases with Notes. By Wm. Draper Lewis. Philadelphia: International Printing Co. 1904. pp. ii, xv, 405. 8vo.

Although this collection of cases is avowedly intended to illustrate phases of equity jurisdiction, almost half of the book is occupied by a consideration of the existence and growth of the legal rights involved. There would seem to be danger that the great conflict as to the substantive law on these questions will obscure to some extent the doctrines of equity. This is especially true of the chapters dealing with the infringement of patents, literary and artistic property, property in business reputation, and the right of privacy, where the conflict is not as to the remedy to be afforded, but rather as to the existence of the right.

In the fourth chapter the author has collected the cases in which the right to contract and property in contracts have been infringed. The treatment here is thorough and all the important cases are collected. The comprehensive notes, with the authorities collected to date, make the work of value alike to student and practitioner. From the note to *Lumley v. Wagner* on pp. 202 and 203, an impression is gained that an injunction will lie in all cases to restrain the commission of a tort by inducing a third party to break his contract with the plaintiff. Of course *Lumley v. Wagner* cannot be used to support such a proposition. In that case the right to restrain Gye from employing Miss Wagner seems to be assumed as a necessary result from the right to restrain Miss Wagner from breaking her contract with Lumley; but this latter right depends upon the nature of the contract, and in those cases where the remedy at law for breach of contract is adequate, equity will not take jurisdiction. See *Sternberg v. O'Brien*, 48 N. J. Eq. 370.

AN OUTLINE OF THE FRENCH LAW OF EVIDENCE. By Oliver E. Bodington. London: Stevens and Sons, Limited. 1904. pp. viii, 199. 8vo.

Although this work purports to be a comparative study of the English and French methods of proof, it is, with the exception of the final chapter, which points out a few of the distinctions between the two systems, devoted solely to

the investigation of the French law. Aside from the final chapter, the reader is left to make his comparisons from his own knowledge of the English law. As the book is small, the treatment of the different subjects taken up is necessarily brief. The author first outlines the different kinds of evidence admissible in civil cases, and then touches on the method of examining witnesses and introducing proof. Then after describing the method of conducting criminal trials, he finally points out what he considers the salient advantages of each system with particular reference to the jury. The treatment of the subject is by design sketchy rather than exhaustive. Although a lawyer might not agree with the conclusions reached by the author in his comparisons, he would find the book interesting and instructive, and its brevity would no doubt recommend it to the casual student who wishes to gain an idea of the method of procedure in France. But the purpose expressed by the author to make the book simple enough for the lay mind to comprehend seems hardly to have been successfully carried out.

PROBATE REPORTS ANNOTATED: Containing Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law. With Notes and References. By George A. Clement. Vol. VIII. With Index to Vols. I. to VIII., Inclusive. New York: Baker, Voorhis & Company. 1904. pp. li, 838. 8vo.

The plan of this series of reports is "to give in about one volume a year, contemporaneous or recent decisions of the highest courts of the different states of the Union upon all matters cognizable in probate and surrogate courts." It is distinguished from its predecessor, the "American Probate Reports," by the greater attention paid to annotations. The present volume contains cases decided between February, 1902, and June, 1903, one hundred and fifteen in all. The notes are fewer than in previous volumes, which is perhaps due to the fact that the ground has been pretty well covered. The important notes are those on costs and attorney or counsel fees, paraphernalia, and set-off or counterclaim as affecting estate. An interesting short note is that on mental capacity to make a will as affected by spiritualism. The general index of the series, both of notes and of cases, which appears for the first time in this volume, gives it an added value as a work of reference.

THE NATIONAL BANK ACT with all its amendments annotated and explained. By John M. Gould. Boston: Little, Brown, and Company. 1904. pp. xvi, 288. 8vo.

The title of this book well explains its nature. The National Bank Act of 1864 is given, the numerous amendments down to the present time being inserted in the proper places. The whole is annotated with the decisions, both federal and state, explaining or modifying the various provisions. The plan admits ready reference to see what sections have been passed upon. Conflicts in decisions are compared so as to show the weight of authority, and the more than seven hundred cases cited come down to September, 1904. Appendixes give the constitution of the American Bankers' Association, the constitutions and rules of the New York and Boston clearing house associations, and the articles of association of the Chicago clearing house. Separate indexes for the body of the work and for the appendixes are given. The volume seems well adapted to its purpose of practical service.

- A TREATISE ON DAMAGES covering the Entire Law of Damages both Generally and Specifically. By Joseph A. Joyce and Howard C. Joyce. In three volumes. New York: The Banks Law Publishing Co. 1903-4. pp. clxxv, 1-855; cliv, 856-1726; cxxxvii, 1727-2669. 8vo.
- A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW including the statutes and judicial decisions of all jurisdictions of the United States. By John Henry Wigmore. In four volumes. Volumes I., II. and III. Boston: Little, Brown, and Company. 1904. pp. lv, 1-1002; xxi, 1003-1974; xv, 1975-3184. 4to.
- CURRENT LAW. A Complete Encyclopedia of New Law. Volumes I. and II. Edited by George Foster Longsdorf and Walter A. Shumaker. St. Paul, Minn.: Keefe-Davidson Company. 1904. pp. x, 1-1208; xviii, 1209-2195. 4to.
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EQUITABLE CONVERSION.¹

III.

THE way having been cleared, as stated at the end of my last article, I now proceed to consider the subject of equitable conversion.

Equitable conversions, like actual conversions, are of two kinds, namely, those which are direct and those which are indirect; and the reason for making this division of equitable conversions is the same as that for making the corresponding division of actual conversions, namely, that a direct equitable conversion is, so far as it is a conversion at all, a direct or immediate change (or what Lord Hardwicke in one case² calls a transmutation and in another case³ a transubstantiation) of one thing into another, as, for example, land into money or money into land, while an indirect equitable conversion is, so far as it is a conversion at all, an exchange of one thing for another, as, for example, land for money or money for land, and is therefore a change of land into money or of money into land only indirectly, *i. e.*, through the medium of such exchange.

A direct equitable conversion differs from a direct actual conversion in this, namely, that while the latter is a fact, the former is a pure fiction. To say, indeed, that a direct equitable conversion

¹ Continued from 18 HARV. L. REV. 83.

² *Guidot v. Guidot*, 3 Atk. 254, 256.

³ *Trafford v. Boehm*, 3 Atk. 440, 448. It must be confessed, however, that *Guidot v. Guidot* and *Trafford v. Boehm* are both cases of indirect conversion.

is other than a pure fiction would be to claim for equity those miraculous powers which the ancient alchemists claimed for themselves.

In order to state the difference between an indirect equitable conversion and an indirect actual conversion, it is necessary, first, to remind the reader that, in the making of an actual exchange of one thing for another, there are generally, though not necessarily,¹ two stages, namely, first, the creating by the owner of the thing to be exchanged of a right in another person to have the exchange made, with a correlative obligation to make the exchange, and, secondly, the actual making of the exchange; and, this being borne in mind, the reader needs only to be told further that whenever these two stages exist in the making of an actual exchange, the creating of the right, if it be one which can be specifically enforced, causes an equitable conversion. It may be added that this right is sometimes legal, and sometimes equitable only.

The immediate object of the direct equitable conversion is to cause a thing to devolve, on the death of its owner, not according to its true nature and quality, but according to the nature and quality which equity, by a fiction, attributes to it, for example, to cause land to devolve as if it were money or money as if it were land. So also it is the immediate object of an indirect equitable conversion to cause the right to have an exchange made to devolve, on the death of its owner, not according to the legal nature of the right, *i. e.*, as a *chose in action*, but according to the nature and quality of the thing to be acquired by the exchange, for example, to cause a right to have land exchanged for money, to devolve as if it were money, or to cause a right to have money exchanged for land to devolve as if it were land.

The ultimate object of a direct equitable conversion is to promote justice, to aid the owner of property in accomplishing an object which he has in view respecting such property, or to promote public policy. The ultimate object of an indirect equitable conversion, on the other hand, is to give more full and complete effect to an act done by the owner of property in respect to such property, and to carry out more fully his presumed intention respecting the same.

Of direct equitable conversions there are more than one species. The most familiar is where an actual conversion of

¹ 18 HARV. L. REV. 2, 3.

property has been made by some person other than its owner, and under such circumstances that justice requires that, on the death of its owner, it should devolve as if no such conversion had been made, and accordingly equity for the purposes of devolution re-converts it, *i. e.*, by the adoption of a fiction, treats it as if it had been actually re-converted or as if it had never been converted, so that land into which money has been converted, though it will devolve at law as land, will devolve in equity as money, and money into which land has been converted, though it will devolve at law as money, will devolve in equity as land. In short, equity will declare the heir or devisee of the deceased, on whom the land has devolved at law, to be a trustee thereof for the personal representative of the deceased, and will treat him accordingly, and will declare the personal representative of the deceased, on whom the money has devolved at law, to be a trustee thereof for the heir or devisee, and will treat him accordingly. It will be seen, therefore, that this species of direct equitable conversion is caused by means of a trust,—a trust, however, which is peculiar, first, in being an implied or constructive trust, *i. e.*, a trust created, not by the owner of the property, but by equity itself, and, secondly, in being precisely like the ancient use, *i. e.*, a simple or passive trust, a trust in which the *cestui que trust* has the entire control over the property in equity, and in which the trustee is merely the servant of the *cestui que trust*, and has no other affirmative duties to perform than to convey the property as the *cestui que trust* shall direct.

In all these particulars this species of direct equitable conversion differs widely from an indirect equitable conversion, for, though a trust is often the cause of the latter, yet it is always a trust created by the owner of the property, and is always an active trust,—a trust also in which, if the trust be valid, the right of the *cestui que trust* is limited entirely to enforcing the specific performance of the trust. Moreover, it is not the existence of such a trust, but its capability of being specifically enforced in equity, that is indispensable to the creation of an indirect equitable conversion. While, therefore, it is the doctrine of trust that causes the direct equitable conversion last spoken of, a trust being the machinery by which equity transfers property from its legal owner to another person, it is the doctrine of specific performance that causes the indirect equitable conversion.

If we look a little more closely into the nature of these two

kinds of equitable conversion, and observe a little more closely the differences between them, we shall find that, while an indirect equitable conversion constitutes the first step, and the first step only, toward an alienation of the thing to be converted, and an acquisition by the alienor or some other person, of the thing into which the conversion is to be made, the direct equitable conversion now in question constitutes a complete alienation in equity of the thing said to be converted, and a complete acquisition in equity of the same thing by another person, though with a fictitious quality attributed to it. We shall also find that, while an indirect actual conversion is caused by the exercise of an absolute right of property, and hence the conversion itself is absolute, and an indirect equitable conversion is caused by the creation of a relative right, and is itself relative only, the direct equitable conversion in question is caused, not by the exercise of any right, but by the power of equity, and hence the conversion which is caused by the exercise of that power and the right which is created by its exercise are both absolute, in so far as it is in the power of equity to make them absolute.¹

There is also another particular in which the direct equitable conversion in question differs from an indirect equitable conversion, namely, that, as the former exists only for the purpose of changing the devolution of the property which it affects, so it exists only for an instant of time, while as the latter is brought into existence by the creation of a right to have an actual conversion made, so it continues to exist until that right is specifically enforced, or otherwise ceases to exist. It follows, therefore, that, when a direct equitable conversion has once accomplished its purpose of causing money to devolve as if it were land or land as if it were money, the fiction ceases, and henceforth equity regards the money as money and the land as land.

For the present, however, we shall be occupied exclusively with equitable conversions of the indirect kind, and my chief object in saying in this place what I have already said about direct equitable conversions is to caution the reader against the danger of confounding the former with the latter. As the fact of a direct equitable conversion is much more easily expressed than that of an indirect one, the reader will often find himself under a sore

¹ See *infra*, pp. 250, 260, 264, 268. For the sense in which the terms "absolute right" and "relative right" are used in this article, see 13 HARV. L. REV. 537-538, 546, note.

temptation, when dealing with indirect equitable conversions, to say of money that it is land in equity when in fact it is merely liable to be exchanged for land, and of land that it is money in equity when it is merely liable to be exchanged for money. This temptation, however, he must resist if he would avoid the most serious errors. He must remember that while actual conversions as well as equitable conversions may be either direct or indirect, yet the only actual conversions which are known to the law are those which are indirect; and hence direct equitable conversions have no actual conversions to correspond with them. If an actual conversion of land, for example, directly into money or of money into land were possible, it would be admitted by all that the nomenclature belonging to direct equitable conversions could be used only when the actual conversion which was to follow would also be direct. The fact being, however, that there is only one kind of actual conversion known to the law, it is equally true that the nomenclature which belongs to direct equitable conversions can be used only when the equitable conversion is not to be followed by any actual conversion; and it must not be supposed, because there are two kinds of equitable conversion, and only one kind of actual conversion, that therefore the latter stands in the same relation to each of the former. When land is exchanged for money, the land never becomes money, nor the money land, either in equity or otherwise; when the exchange is made, they both change owners, but the land remains land and the money remains money all the time, in equity as well as in fact; and the only reason why the land is said to be converted into money and the money into land is that he who before owned the land now owns the money instead, and he who before owned the money now owns the land instead; and the only reason why the creation of a right to have money exchanged for land is said to cause a conversion of the money into land in equity is that this right devolves as if it were land, and equity looks upon it as substituted in the place of the money.

An indirect equitable conversion can regularly be made only by the owner of the thing to be converted, and in a broad sense it may be said that it can be made by him in one way only, namely, by creating in some other person a right to have an actual conversion made; and such a right, if it be one which equity will specifically enforce, will cause an equitable conversion. Why? Because, if the owner of such a right die during its

continuance, the right will devolve in equity, if it be a right to have money converted into land, as if it were land, and, if it be a right to have land converted into money, it will devolve as if it were money. Why will the right so devolve? Because equity looks upon it as sure to be specifically enforced, unless the correlative obligation shall be voluntarily performed, and when the right is so enforced, or the correlative obligation is so performed, the result will be an actual conversion of money into land or of land into money, with all the consequences which follow such a conversion. If, for example, A and B enter into an ordinary bilateral contract for the sale of land by A to B, we may assume that, up to the moment when the contract is made, A owns the land to be sold and B owns the money to be paid for the land, and these are absolute rights.¹ When the contract is made, A and B each acquires a new relative right, namely, A a right to have money, and B a right to have land, and at the same time each of them incurs a correlative obligation, namely, A to convey the land and B to pay the money; and, as equity regards it as certain that both these obligations will be performed, it regards the new relative rights as having superseded, for the purposes of devolution, the former absolute rights. To be sure, B's money will, in case of his death, in form devolve upon his executor, but it will be only a form, as it must eventually go to A in payment for the land. So A's land will in form devolve, in case of his death, upon his heir or devisee; but this again will be only a form, as the land will eventually have to be conveyed to B in performance of A's obligation. As, therefore, the new relative rights have superseded in equity the old absolute rights, they ought to devolve, not as the old absolute rights would have devolved, but as the new absolute rights would devolve, if the sale had been complete; and hence, if B die before the purchase is completed, his new relative right under the contract will devolve in equity on his heir or devisee.²

In the example just put, moreover, it is plain that B's money, in case of his death, does not become land in equity for the purposes of devolution, for this money goes to A, as to whom no question of equitable conversion arises. It is not, therefore, B's money, but his right to A's land, that is treated by equity as land. So also, in case of A's death, it will not be his land, but his right

¹ See *supra*, page 248, note.

² *Per* Lord Hardwicke, in *Gibson v. Lord Montford*, 1 Ves. 485, 494; *Milner v. Mills*, Mos. 123; *Garnett v. Acton*, 28 Beav. 333.

to B's money, that equity will treat as money. And so it is in all other cases of indirect equitable conversion.

How can a right to have an actual conversion made be created? In two ways, namely, either by a contract to buy or to sell land, or by a direction to another person to do so. Of such contracts, there are more than the one species already mentioned, though that is practically the only one that is bilateral, and is believed to be absolutely the only one by which an equitable conversion is created both of land into money and of money into land, as well as the only one in which an agreement to buy or sell land is alone sufficient to create an equitable conversion. Such a contract is also believed to furnish the only instance of an equitable conversion which is always coextensive with the actual conversion which is agreed or directed to be made.

As no right can cause an equitable conversion unless it can be enforced specifically, and as a bilateral contract for the sale and purchase of land cannot be enforced specifically at the suit of either party, unless it can be so enforced at the suit of each party, it follows that such a contract cannot cause an equitable conversion, either of land into money or of money into land, unless each party is capable of performing his side of the contract, and can be compelled to do so. If, therefore, the seller cannot make such a title to the land as the buyer will be compelled to accept, there will be no equitable conversion,¹ unless the buyer shall choose to accept such a title as the seller can make, though, if the buyer so accept the seller's title as to prevent his afterwards objecting to its insufficiency, the effect of the contract will henceforth be the same as if the title had been good. So, if either party shall lose his right to enforce specific performance by laches or delay, the equitable conversion will then cease, unless the other party shall choose to waive the defense thus opened to him. Moreover, if a seller be unable to make a good title, and the buyer die before the purchase is completed, his executor may prevent a specific performance by refusing to pay the purchase money, though the buyer's heir or devisee may wish to accept such a title as the seller can make, for the only person who can waive a defense to a claim is the person against whom the claim is made, and here that person is the buyer's executor, for it is he who must pay the

¹ *Green v. Smith*, 1 Atk. 572; *Broome v. Monck*, 10 Ves. 597; *Thomas, In re*. 34 Ch. D. 166.

purchase money.¹ And the same will, of course, be true of any other defense against specific performance which was open to the buyer when he died. So, if the seller die after the buyer has lost his right to specific performance by laches or delay, the seller's heir or devisee may prevent specific performance by refusing to convey the land, though the seller's executor will, of course, wish specific performance to be enforced, in order that he may obtain the purchase money.

If a buyer die before the purchase is completed, and his right to specific performance is afterwards lost without the fault of his heir or devisee, the general opinion has been that the heir or devisee, though he cannot have the land, will be entitled to receive the purchase money from the buyer's executor. Thus, where the contract was binding on the buyer, but a power of rescission was reserved to the seller, and was exercised by him after the death of the buyer, who died intestate, it was held that the heir of the latter, though he could not have the land, was entitled to receive the purchase money from the buyer's executor.² So in *Whittaker v. Whittaker*,³ where the buyer, after making the contract devised the land by way of family settlement, the plaintiff being the first tenant for life, but the buyer's right to specific performance was lost after his death, owing to a long-continued uncertainty as to whether he had left sufficient assets to enable his executor to pay for the land, Sir R. P. Arden, M. R., held that the plaintiff, though not entitled to have the purchase money paid over to him, was entitled to have it invested in other land, to be settled to the same uses to which the land contracted for had been devised. He rested his decision, however, not upon the contract, but upon the will, and, for that reason, Lord Eldon, in an elaborate judgment in *Broome v. Monck*,⁴ while approving of the decision, rejected the ground upon which it was rested. So, if the seller die before the sale is completed, and his right to specific performance is afterwards lost without the fault of his executor, the general opinion

¹ *Langford v. Pitt*, 2 P. Wms. 629, 632; *Alleyn v. Alleyn*, Mos. 262; *Milner v. Mills*, Mos. 123; *Garnett v. Acton*, 28 Beav. 333; *Hood v. Hood*, 3 Jur. N. s. 684. And, as the buyer's executor must pay the purchase money to the seller, if the latter be also the buyer's heir, he may keep the land as such heir, and yet compel the buyer's executor to pay him the purchase money. *Cum duo jura in una persona concurrunt, æquum est acsi essent in diversis*. *Coppin v. Coppin*, 2 P. Wms. 291.

² *Hudson v. Cook*, L. R. 13 Eq. 417.

³ 4 Bro. C. C. 31.

⁴ 10 Ves. 597.

has been that the latter, though he cannot recover the purchase money from the buyer, can recover the land from the seller's heir or devisee.¹ It seems impossible, however, to reconcile these views with any principle. Up to the moment of his death the buyer had only a right to the land, and that was on condition of his paying the purchase money to the seller, and he was also under an obligation to pay the purchase money on the condition of his receiving the land; and, on his death, his right devolved in equity on his heir or devisee, and his obligation devolved on his executor. It is assumed that the seller refuses to convey the land and that he cannot be compelled to convey it, and hence that the buyer's executor cannot be compelled to pay the money to the seller. Therefore, it is said, he must pay it to the buyer's heir or devisee! So also the seller, up to the moment of his death, had only a right to receive the money, and that was on condition of his conveying the land, and he was also under an obligation to convey the land on condition of his receiving the money; and, on his death, both his right and his obligation devolved at law upon his executor, though his obligation devolved also in equity, with the land, upon his heir or devisee. It is assumed that the buyer refuses to pay the money, and that he cannot be compelled to pay it, and hence that the seller's heir or devisee cannot be compelled to convey the land to the buyer. Therefore, it is said, he must convey it to the seller's executor! Could there be two more palpable nonsequiturs? A (the buyer's heir or devisee) files a bill against B (the buyer's executor) and C (the seller) to compel B to pay money to C, and to compel C to convey land to A. A is wholly defeated, and what is the consequence? That his bill is dismissed with costs? No; that his bill is dismissed as against C, but that a decree is made in his favor against B that he pay the money directly to A. Why? For no other reason than that it has been found that he is not bound to pay it to C. So, again, A (the seller's executor) files a bill against B (the seller's heir or devisee) and C (the buyer) to compel B to convey land to C, and to compel C to pay money to A. A is wholly defeated, but, instead of his bill's being dismissed with costs, a decree is made in his favor against B that, as it has been found that he is not bound to convey the land to C, therefore he shall convey

¹ In *Curre v. Bowyer*, 5 Beav. 6, note (b), where the seller had died, and the buyer afterwards lost his right to specific performance, Sir John Leach held that the seller's next of kin were entitled to the land.

the same to A! For neither of these conclusions, however, can any more than two reasons be given, namely, for the first, that the buyer's heir or devisee has, without his fault, been disappointed in his expectation of getting the land, and that the seller is not entitled to the money, and, for the second, that the seller's executor has, without his fault, been disappointed in his expectation of getting the money, and that the buyer's heir or devisee is not entitled to the land; and none of these reasons are good. To make the first and third of any value it must appear that the disappointment was, in whole or in part, the fault of the buyer's executor and the seller's heir or devisee respectively, and this neither appears nor is assumed. As to the second and fourth reasons, it would be sufficient to say that the fact of A's not being liable to B is no reason for saying he is liable to C. In this case, however, it is possible to say more; for the non-liability of the executor of the buyer to the latter's heir or devisee is a much clearer proposition than his non-liability to the seller, for his liability to the latter lacks only the performance of a condition, while he is, in law, a total stranger to the former. So, also, the non-liability of the heir or devisee of the seller to the latter's executor is a much clearer proposition than his non-liability to the buyer's heir or devisee, for his liability to the latter lacks only the performance of a condition, while he is, in law, a total stranger to the former.

Upon the whole, it seems clear, on principle, that the executor of a buyer of land is bound, as such executor, only by his testator's contract of purchase, and that such contract binds him to do one thing only, namely, to pay the purchase money to the seller, and that he can be compelled to do this either by the seller, or by the heir or devisee of the buyer,—by the latter, because the payment is necessary to enable such heir or devisee to obtain the land; but that if, in a given case, the seller is not entitled to the money, the executor of the buyer is under no obligation to pay it to anyone, but is entitled to keep it as such executor. So it seems equally clear that the seller's heir or devisee is bound only to convey the land to the buyer, and that he can be compelled to do this either by the buyer, or by the seller's executor,—by the latter, because the conveyance is necessary to enable him to obtain the money; but that if, in a given case, the buyer is not entitled to the land, the heir or devisee of the seller is under no obligation to convey it to anyone else, but is entitled to keep it.

If, in case of the death of the buyer before the purchase is com-

pleted, it be doubtful whether he has left sufficient assets to enable his executor to pay for the land, or if, in a suit for specific performance, his executor shall refuse to admit sufficient assets for that purpose, his heir or devisee may always secure the land by himself advancing the purchase money, and he may do this with a certainty of being reimbursed, if the assets left by the buyer shall turn out to be sufficient to reimburse him.¹

A contract for the sale and purchase of land has always been treated by the courts as creating an equitable conversion in favor of the seller as well as in favor of the buyer. In truth, however, as has been seen in a previous article,² such a contract works a conversion of the seller's land into money on legal principles, and without any other aid from equity than such as it affords by enforcing the contract specifically against the seller's heir or devisee. In short, the right of the seller to receive the purchase money in exchange for his land will devolve on his executor by operation of law, whereas, in order to create an equitable conversion, it must so devolve in equity alone.

There is another species of bilateral contract which has been held, in a few cases,³ to create an equitable conversion in favor of one of the parties to it, namely, a building contract, *i. e.*, a contract between a land owner and a builder for the erection of a building by the latter on the land of the former. In case of the death of the land owner before the building is erected, his heir or devisee will alone profit from the performance of the contract by the builder, and, therefore, there is strong reason why the land owner's right to such performance should devolve in equity with the land on his heir or devisee, though the performance must be at the expense of his executor, for, if such right should devolve, with the obligation to pay its price, upon the executor, the contract would be certain not to be performed, as the executor would find it much cheaper to buy off the builder than to pay him for performing the contract. Still, there is a very serious obstacle to be removed before such a contract can work an equitable conversion, namely, the refusal of equity to enforce the specific performance of the contract. Why is it, then, that such a contract is held to work an equitable conversion? Because formerly, and

¹ *Per* Lord Eldon, in *Broome v. Monck*, 10 Ves. 597, 614-615.

² See 18 HARV. L. REV. 10.

³ For example, in *Holt v. Holt*, 2 Vern. 322, and *per* Lord Hardwicke in *Rook v. Worth*, 1 Ves. 460, 461.

when the doctrine was settled, equity did enforce the specific performance of building contracts, — and in fact it never refused to do so till since the time of Lord Hardwicke;¹ and the doctrine is still adhered to² as being established by authority, notwithstanding the *sine qua non* of specific performance has failed, just as a contract for the purchase of land has been held to work an equitable conversion in favor of the heir or devisee of the buyer, notwithstanding the buyer's right to specific performance has been lost, the court giving the money to the heir or devisee when he cannot have the land. Is, then, the doctrine that a building contract works an equitable conversion of the land owner's money into land, just as a contract for the purchase of land does, to be deemed erroneous on principle? Yes, unless equity shall consent to make an exception in favor of the heir or devisee of a deceased land owner, to its rule that a building contract will not be specifically enforced, — which, it seems, equity might do.

The only other species of contract which it will be necessary to notice, as causing an equitable conversion, differs very widely from the two species of contract already considered, it being the unilateral covenant often found in English marriage settlements and marriage articles, to lay out a given sum of money in the purchase of land, or to purchase land of a given annual value and to settle the land so purchased. Such a covenant is, therefore, an agreement to make a settlement, the reason for making such a covenant instead of an actual settlement commonly being that the person who is to make the settlement has not the land at the time of the marriage, or has not land which he wishes, or is in a condition to settle. The reader will see, at once, therefore, how widely such a covenant differs from the ordinary agreement for the purchase and sale of land. It does, indeed, involve a purchase of land, and, therefore, an agreement for purchase and sale of land, but such purchase is to be made of some third person, not ascertained at the date of the covenant, and, of course, the agreement to purchase must be made with the same person. What is, however, of much greater legal importance is the fact that the particular land to be purchased is wholly unascertained, nothing, in fact, being fixed, except the amount of money thus to be laid out, or the annual value of the land to be purchased. What is of still greater legal importance, however, is the fact that

¹ See *Rayner v. Stone*, 2 Eden 128.

² *Cooper v. Jarman*, L. R. 3 Eq. 98; *Day, In re*, [1898] 2 Ch. 510.

the vital part of the agreement is to be found, not in the covenant to purchase land, but in the covenant to settle the land when purchased. Without this latter branch, indeed, the covenant would not constitute a contract at all, for, as it would be simply a covenant to purchase land with the covenantor's own money, the land, when purchased, would belong absolutely to him, and, therefore, he would incur no obligation to make the purchase; or, to express the same thing in another form, without the covenant to settle the land, no right would be created in anyone to have land purchased, and, therefore, the covenantor could neither be compelled to make the purchase, nor to pay damages for not doing so. It is, therefore, the covenant to settle the land which requires particular attention. What is meant by a settlement of land, or by settled land? The phrases "settled estate" and "settled land" have become very familiar in English law during the last half-century, no less than six "Leases and Sales of Settled Estates" acts having been passed between 1856 and 1877, both inclusive,¹ and no less than five "Settled Land" acts between 1882 and 1890, both inclusive.² Under these acts, a "settled estate" or "settled land" is declared to be any estate or land which stands limited to several persons in succession. The most familiar form in which land stands so limited in a marriage settlement is that of a limitation to the use of the intended husband for life, remainder, as to a part or all of the land, to the use of the intended wife for life, by way of jointure and in lieu of dower,³ remainder to the use of the first and other sons of the marriage successively in tail, or in tail male, remainder to the use of the daughters of the marriage as tenants in common in tail, remainder to the use of the intended husband in fee. Sometimes the first limitation of all is one to the use of trustees for a long term of years in trust to raise a certain sum annually, during the coverture, for the wife by way of pin-money; and generally the first limitation after the death of the husband and wife is to trustees for a long term of years in trust to raise portions for daughters and younger sons of the marriage, in the event of there being a son

¹ 19 & 20 Vict. c. 120, 1856; 21 & 22 Vict. c. 77, 1858; 27 & 28 Vict. c. 45, 1864; 37 & 38 Vict. c. 33, 1874; 39 & 40 Vict. c. 30, 1876; and 40 & 41 Vict. c. 18, 1877.

² 45 & 46 Vict. c. 38, 1882; 47 & 48 Vict. c. 18, 1884; 50 & 51 Vict. c. 30, 1887; 52 & 53 Vict. c. 36, 1889; and 53 & 54 Vict. c. 69, 1890.

³ Within recent times, the wife's jointure seems to be generally secured by limiting to her, not an estate in land for her life, but a rent charge.

of the marriage in whom the first estate tail shall vest. The only thing, however, that can be asserted broadly of marriage settlements is that they have for their object the making of a provision for the wife and children of the intended marriage; for, within the limits which that object prescribes, the limitations in such settlements vary, as the circumstances and the views of the parties vary. It follows, therefore, that a covenant to make such a settlement must state the limitations to be made with the same particularity as the settlement itself, so that the limitations in the settlement will be a mere copy of those in the covenant.

Such a covenant is generally made by the intended husband or his father, and is made with relatives or friends of the wife, as trustees for the wife and children, and it generally provides that the land when purchased shall be conveyed to the same trustees in fee, and to the several uses specified. The covenant is also generally made in consideration of the intended marriage, and of a sum of money, paid to the husband or settlor by the wife's father, as the wife's marriage portion.

Assuming the limitations to be such as have been already stated, it will be seen that, when the covenant, and consequently the settlement, is made by the intended husband, the covenant and settlement do not extend to the life interest limited to the husband, nor to the ultimate fee which is also limited to him, those limitations being, in effect, mere reservations by the husband of a portion of what would wholly belong to him, but for the covenant and settlement. And even if the covenant and settlement be made by the husband's father, it seems that so much of the covenant as is in favor of the husband cannot be specifically enforced, as the considerations upon which the covenant is made extend only to the wife and the children of the marriage. Whether, therefore, the covenant be made by the husband or not, only so much of it as is in favor of the wife and children of the marriage creates rights which can be specifically enforced. In the first instance, moreover, it is only in favor of the wife that such a covenant creates a right, as the rights which it creates in favor of children will come into existence only as children are from time to time born; and, if there be no children of the marriage, the obligation created by the covenant will cease on the death of the wife, if the husband be the covenantor, and will cease, in any event, on the death of the husband and wife, and the land, if purchased and settled, will thenceforth belong wholly to the settlor.

Such, then, being the extent and nature of the rights created by the covenant under consideration, what is the extent of the equitable conversion which it causes? The limitations covenanted to be made in favor of the husband do not, it seems, cause any equitable conversion, even when the covenant is not made by him, there being no consideration for the covenant so far as it is in his favor, and, therefore, no right to specific performance. There is also another reason why the right of the husband, as well as that of the wife, to a life interest can practically cause no equitable conversion, namely, that it expires with the life of its owner, and hence cannot devolve on his death. The only rights, therefore, created by such a covenant, which will devolve on the death of their owner, and which, being capable of being specifically enforced, will devolve like land, are those created in favor of the children of the marriage. Moreover, as no child is generally entitled to a greater estate in the land to be purchased than an estate tail, and as such an estate expires on the death of the tenant in tail without issue, it follows that the interest of a child will devolve on his death only when he leaves issue. It must also be borne in mind that a covenant to purchase and settle land will cause an equitable conversion only so long as the covenant remains wholly unperformed, for, the moment that the land is purchased, the conversion before covenanted to be made is actually made, and the interests of the children will henceforth be land for all purposes, and without invoking the aid of equitable conversion. It will be seen, therefore, that the interest of a child under such a covenant can devolve as land, by virtue of the principle of equitable conversion, only when the covenant remains wholly unperformed until such child marries, has issue, and dies.

As it is not the right to have land purchased, but the right to have it settled, that causes an equitable conversion, of course it is the latter right, and not the former, that measures the extent of the equitable conversion caused by a covenant to purchase and settle land. This is, in fact, no more than saying that, on the death, intestate, of a person who has a right to have land which is to be purchased conveyed to him in fee-simple, such right will descend to his heir, and hence there will be an entire equitable conversion of the price of the land into land; and that, on the death of a person entitled to have land which is to be purchased conveyed to him in fee-tail, his right will descend to his issue in tail, if he leave issue, and to them alone, and hence there will be

an equitable conversion of the price of the land into land for so long a time only as there shall continue to be issue of the deceased, while, on the death of a person entitled to have land, which is to be purchased, conveyed to him for his life, no right whatever will survive the deceased, and hence there will be, for the purposes of devolution, no equitable conversion of the price of the land into land. Yet, in each of the three cases just put, the right of the deceased to have land purchased is the same, namely, to have a given sum of money laid out in the purchase of land in fee-simple, or to have the fee-simple of land of a given annual value purchased. Why? Because it is of such land that the deceased is entitled to have the fee-simple, or a fee-tail, or an estate for life, conveyed to him. If, therefore, in marriage articles the intended husband covenant to purchase and settle land, in the manner before stated, while there may be an indefinite number of persons, each of whom will be entitled to enforce the covenant specifically, and to its full extent, yet, as the covenant will direct no limitation of the fee-simple in the land to be purchased, there will remain in the husband, in every event, an ultimate reversionary interest in the money to be laid out in land, as to which there will be no equitable conversion, and, if the covenant be performed, a corresponding interest in the land purchased and settled will remain in the husband, *i. e.*, if the husband purchase the land, and convey it in fee to the trustees of the settlement to the several uses directed in the covenant, the last of those uses will be to the husband in fee.

After what has been said, it can scarcely be necessary to caution the reader against entertaining the notion that a single covenant to purchase and settle land can cause only a single equitable conversion, as it is obvious that each separate right, created by such a covenant, to acquire an inheritable interest in the land to be purchased, will cause an equitable conversion, provided the right be one which equity will enforce specifically; and even though the right be to acquire only an estate for life, there will in strictness be an equitable conversion during the continuance of that estate, though it will not be likely to be followed by any practical consequence.

Between an actual conversion and an indirect equitable conversion there is the same difference as between an absolute right and a relative right.¹ An absolute right exists for all purposes and as to

¹ See *supra*, page 248, note.

all persons, while a relative right implies a relation between two persons, one of whom has the right against the other, and the other of whom is under a correlative obligation to him who has the right. A relative right, therefore, as such, has no existence except in favor of the person who has it, and as against the person who is subject to the correlative obligation. So also an actual conversion is made in the exercise of an absolute right, and therefore it exists for all purposes and as to all persons, while an indirect equitable conversion is merely an equitable consequence of a relative right, and is, therefore, necessarily subject to the same limitations as the right of which it is a consequence. Such an equitable conversion, therefore, can have no existence except as to the person of whose right it is a consequence, — least of all can it have any existence as to the person who is subject to the correlative obligation. When, therefore, an intended husband, for example, covenants, in marriage articles, to purchase land, and settle the same, in the manner before stated, such covenant will create equitable conversions only as to the intended wife and the children of the marriage, — not as to the husband. If, therefore, the husband die intestate before performing the covenant, all his personal property will devolve upon his executor, just as if he had made no such covenant; the only difference will be that the obligation which the husband incurred by making the covenant will also devolve upon his executor. In other words, the personal property in the hands of the executor will be subject to the burden of the covenant.

Such are upon principle, as it is conceived, the effects produced by the covenant now under consideration in respect to the equitable conversion which it causes. It is time, however, to inform the reader that a very different view is presented by the authorities; for it has been held, from the earliest times, and without a dissenting voice, first, that any limitation directed by such a covenant, which confers a right to have the covenant fully performed, causes an equitable conversion into land of the entire interest in the money covenanted to be laid out in land, though the limitation which causes the conversion be only for life, *i. e.*, that the equitable conversion is measured by the actual conversion which the covenant requires, and is coextensive with it; secondly, that every such conversion is absolute, not relative, or, at least, that the money covenanted to be laid out in land is converted in equity into land, not only as to the persons in whose favor the land to be

purchased is covenanted to be limited, but also as to the covenantor; and accordingly it is held that a covenant by an intended husband to lay out money in the purchase of land and to settle the land in the manner before stated will, immediately on the solemnization of the marriage, cause a complete equitable conversion of the money so covenanted to be laid out, not only as to the wife and the children of the marriage, but as to the husband also, subject only to the condition of the wife's surviving the husband, for the limitation covenanted to be made in favor of the wife for her life will give her an undoubted right to enforce a full performance of the covenant.

Thus, in *Lingen v. Souroy*,¹ where an intended husband covenanted to lay out an identified fund of £1400 in the purchase of land, and to settle the land in the manner just stated, and there was no issue of the marriage, and the husband died without having performed the covenant, and leaving his wife surviving him, and having devised all his real estate, with a certain exception, to his nephews, and bequeathed all his personal estate to his wife, whom he also appointed his executrix, and the nephews filed a bill against the wife, claiming the £1400 subject to the wife's life interest therein, Lord Harcourt made a decree in the plaintiff's favor, holding that the £1400 passed to them as land, under the husband's will, by virtue of the words "all my other lands in the city and county of York, or any other part of Great Britain"; and his decree was affirmed by Lord Cowper on a rehearing. The plaintiffs, therefore, accomplished the extraordinary feat of recovering against the testator's wife on the strength of a right vested in her by the covenant to have the £1400 laid out in land and settled on her for life. It is to be hoped that such an instance of a *damnosa haereditas* would be sought for in vain elsewhere than in *Lingen v. Souroy* and other cases² which have followed its authority. If the husband had died intestate, his heir would have been relieved from a portion of the burden of proof which rested upon his devisees, for the latter had to prove, not only what the heir must have proved, but also that they had been put by the testator in the place of the heir, and it seems clear that, by the word "lands," the testator meant lands of which *locality* could be predicated, *i. e.*, actual land.

¹ 1 P. Wms. 172, 10 Mod. 39, Gilb. Eq. Rep. 91, Ch. Prec. 400.

² For example, *Walrond v. Rosslyn*, 11 Ch. D. 640.

In *Edwards v. Countess of Warwick*¹ an intended husband covenanted that £10,000, being a part of the intended wife's marriage portion, and which was to be deposited by the wife's father in the hands of trustees, should be laid out by the latter in the purchase of land, to be settled on the husband for ninety-nine years, if he should live so long, remainder to the first and other sons of the marriage in tail male, remainder to the husband in fee. The marriage took place, and the husband afterward died, leaving a son in whom the first limitation in tail male vested, but who afterward died without issue, and thereupon all the limitations covenanted to be made of the land to be purchased with the £10,000 were exhausted, and the money had never been laid out. It would seem plain, therefore, that the husband's reversionary interest in the £10,000, which had been personal property from the beginning, and which, on the husband's death, had devolved on his personal representative, for the benefit of his wife and son, became an absolute interest on the death of the son, whose share therein devolved upon his personal representative for the benefit of his mother and his half-sister, *i. e.*, his mother's daughter by a second husband. It was held, however, by Lord Macclesfield, that this reversionary interest was converted in equity into land, and, on the husband's death, descended to his son and heir, and, on the death of the latter, descended to *his* heir, namely, the plaintiff's wife, who was his father's sister, and his decision was affirmed by the House of Lords.

In *Lechmere v. Earl of Carlisle*,² the facts were substantially the same as in *Lingen v. Souroy*, except that the intended wife's jointure was by way of a rent-charge, instead of a life estate, and that the intended husband died intestate. The bill was filed by the husband's heir, and was for a specific performance of the husband's covenant to lay out £30,000 in the purchase of land, and to settle the land; and a decree was made in the plaintiff's favor by Sir Joseph Jekyll, M. R., — which was affirmed by Lord Talbot on appeal.

In one respect the decisions in the last two cases are even less defensible than that in *Lingen v. Souroy*, for in the latter there was a right in the wife to have the covenant specifically performed, while in *Edwards v. Countess of Warwick* and *Lechmere v. Earl of Carlisle* there was no such right in anyone, either when

¹ 2 P. Wms. 171, 1 Bro. P. C., Toml. ed., 207.

² 3 P. Wms. 211.

the bill was filed or at any time afterward. In *Edwards v. Countess of Warwick* only one of the limitations which the husband covenanted that his trustees should make ever took effect, and that expired on the death of the son without issue, and it will, therefore, now be admitted that the equitable conversion which had once existed had ceased to exist before the bill was filed.¹ In *Lechmere v. Earl of Carlisle* the wife, on whose marriage the covenant to purchase and settle land was made, was still living, and was entitled to a jointure, but, as her jointure was to consist only of a rent-charge, she would not be entitled to any estate in the land to be purchased, — only to a charge thereon, and, therefore, she had no right to have land purchased and settled; and, though it has generally been supposed that such a right would work an equitable conversion, and was expressly so held in *Walrond v. Rosslyn*,² yet I shall endeavor to show hereafter that such a view cannot be supported.

In *Lingen v. Souroy*, *Edwards v. Countess of Warwick*, and *Lechmere v. Earl of Carlisle*, it was alike held that there was an equitable conversion in favor of the husband's heir or devisee, and, therefore, in favor of the husband himself, and yet the husband's only relation to the covenant which was assumed to have caused an equitable conversion was that of covenantor and obligor, he having no right whatever under the covenant, and no rational person will claim that a covenant can work an equitable conversion, except by virtue of a right or rights which it creates. It was also necessarily held in each of these three cases, and was expressly held in *Lechmere v. Earl of Carlisle*, that the husband's heir or devisee could maintain a suit for the specific performance of the covenant; and yet it was not possible that such heir or devisee should, as such, derive any right of action whatever from the covenant. It was also necessarily held that a relative right and the correlative obligation³ could coexist in and devolve from the same person, — a thing plainly impossible.

The reader will also bear in mind that the true question in each of these three cases was, not whether the money in question had devolved from the husband upon his heir or devisee as if it were

¹ *Walrond v. Rosslyn*, 11 Ch. D. 640. "To keep on foot the notional conversion of money into land, it is evident there must be a right in someone to insist upon the actual conversion." *Lewin on Trusts*, 10th ed., 1158 (c. xxxii).

² *Supra*.

³ See *supra*, page 248, note.

land, but whether a right to have the money laid out in the purchase of land, and to have the land settled as stated in the covenant, had so devolved; and if the court had taken that view, and adhered to it consistently, it could not have made the decision that it did make in either of these cases, for it could not have failed to see that no such right could devolve from the husband, as no such right was vested in him, — that his only right consisted in the ownership of the money in question, and that that money could not possibly devolve from the husband as if it were land as a consequence of the specific performance of the covenant, since such specific performance would necessarily involve a transfer of the money from the husband to the seller of the land, and that such money could devolve from the husband as if it were land only by means of a trust created by equity itself, namely, by treating the personal representative of the husband as holding the money as a trustee for the husband's heir or devisee.

By way of showing how radical were the mistakes which the Court of Chancery was capable of making at about the time when the three cases now in question were decided, the case of *Chaplin v. Horner*¹ may be referred to, where an intended husband covenanted in a marriage settlement to lay out £2000 in the purchase of land to be settled *on himself and his heirs*, and after his death the daughter and only child of the marriage filed a bill, as her father's heir, against her mother, as his administratrix, for a specific performance of the covenant, and Sir Joseph Jekyll, M. R., made a decree in her favor; and yet the words in italics were wholly inoperative, and so the covenant was simply that the husband would lay out £2000 of his own money in the purchase of land, and, as the land, like the money, would be absolutely his, the covenant was a mere nullity.

The only other mode in which an owner of land or money can cause an equitable conversion of his land into money or of his money into land, is by the creation of a trust or duty to sell his land, or to purchase land with his money. Such a trust may be created either by deed or other act *inter vivos*, or by will, though it is nearly always done by will. Instead of creating a trust, however, a testator may, by his will, simply direct a conversion to be made, *i. e.*, he may confer a power upon his executor (I say executor, for he is nearly always the person selected) to sell his

¹ 1 P. Wms. 483.

land, or to purchase land with his money, at the same time making it his duty to exercise the power.¹ Why does the creation of such a trust or duty cause an equitable conversion? For the same reason that a contract causes an equitable conversion, namely, that equity will enforce the specific performance of such trust or duty.

When such a trust is created by deed, the equitable conversion takes place the moment that the deed is delivered; when such trust or duty is created by will, the equitable conversion takes place the moment that the testator dies, *i. e.*, the moment that the will takes effect. If, however, the trust or the duty be subject to a condition precedent, the equitable conversion will not take place until the deed or will takes effect, nor until the trust or duty becomes absolute. But the mere fact that the actual conversion is not to be made until some event which is certain to happen shall happen, for example, until such a person shall die, will not affect the time when the equitable conversion will take place. Why not? Because the time when the equitable conversion takes place depends, not upon the time when the trust or duty is to be performed, *i. e.*, when the specific performance of it may be enforced, but upon the time when the right to have it specifically performed is created. It is, as we have already seen, the creation of this right which causes an equitable conversion, and a right may exist presently, though it is not enforceable until a future day, just as a debt may exist presently, though it be not payable until a future day. If I have a right to-day to have certain land sold on the death of A, and one half of the proceeds of the sale paid to me, my right will be less valuable during A's life than it will be after his death, but its legal nature will always be the same, whether A be alive or dead.

When it is said that such a trust or duty as has been described creates an equitable conversion, no more is meant than that it will do so if certain other things concur. We have already seen that a covenant, in a marriage settlement or marriage articles, to lay out money in the purchase of land will not cause an equitable conversion, nor even create a contract, without the addition of a covenant to settle the land when purchased; and so it is of a trust to sell or purchase land. To the creation of a trust a *cestui que trust* is indispensable, and to the creation of a duty a person to

¹ See 13 HARV. L. REV. 549.

whom, or in whose favor, the duty is to be performed is indispensable. A trust or duty, therefore, to sell land must be followed up with some disposition of the proceeds of the sale, and a trust or duty to buy land must be followed up with some disposition of the land to be purchased; otherwise no trust or duty, still less any equitable conversion, will be created. What such disposition must be in order that a valid and binding trust or duty may be created, we have seen in a previous article;¹ and it may now be added that any disposition which will be sufficient to render the trust or duty valid and binding will also be sufficient to cause an equitable conversion. What will be the extent of such equitable conversion? It will be precisely coextensive with the disposition made of the proceeds of the sale, or of the land to be purchased. Thus, if a trust or duty be to sell land, and divide the proceeds of the sale between A and B, the entire fee-simple of the land will be converted in equity into money. If the trust or duty be to sell the land, and pay one half of the proceeds of the sale to A, the fee-simple of an undivided half only of the land will be converted in equity into money; and yet the entire interest in the land must be sold in order to ascertain the amount to be paid to A. While, however, the actual conversion will thus extend to the entire interest in the land, the trust or duty will extend only to this one half of the proceeds of the sale, and the remaining half of such proceeds will belong to the person or persons to whom the land belonged when the sale took place, and to whom the land would still belong if it had not been sold, and that, too, not because of any equitable conversion, or of any other principle of equity, but by virtue of common law principles alone, just as the entire proceeds of the sale would have so belonged if the creator of the trust or duty had devised the land to trustees upon special trusts, and had given to the trustees a mere authority to sell the land, and had made no disposition of the proceeds of the sale,—in which case such proceeds would belong at law to the trustees to whom the land belonged when the sale was made, and would be held by them on the same trusts on which the land was previously held.

If, on the other hand, the trust be to purchase land, and convey the same to A and B in fee, it seems that there will be no equitable conversion of the money into land, as A and B can each

¹ 18 HARV. L. REV. 22.

claim one half of the money, just as A could claim all the money,¹ if the trust or duty had been to purchase land and convey it to him in fee, but if the trust be to purchase land, and convey the same to A for life, remainder to B in tail, remainder to C in fee, there will be a conversion in equity of the entire interest in the money into land.

In truth, the medium through which an indirect equitable conversion is made, whether it be a contract, a trust, or a duty, always constitutes the first step towards an alienation of the thing to be converted, and an acquisition, by the alienor or someone else, of the thing into which the conversion is to be made.² Moreover, this first step, while it does not in law or in fact complete either the alienation of the one thing or the acquisition of the other, yet it does do both in equity in a qualified sense, and it is for that reason that it is said to cause an equitable conversion. For that purpose, however, the contract, trust, or duty must be binding and irrevocable, and must also be capable of being specifically enforced in equity.

If the equitable conversion be caused by a mutually binding bilateral contract for the purchase and sale of land, the contract constitutes the first step by the seller towards the alienation of the land, and the acquisition of money instead, and the first step by the buyer towards the alienation of his money and the acquisition of land instead, and the contract is said to cause an equitable conversion both by the seller and the buyer, because equity looks upon the seller as having already parted with his land, he having incurred an obligation to part with it which equity will specifically enforce, and because equity looks upon the buyer as having, for similar reasons, already parted with his money, but chiefly because the seller has acquired by the contract a legal right to have the money paid to him on his conveying the land, and the buyer has acquired a legal right to have the land conveyed to him on his paying the money, both of which rights, being specifically enforceable, devolve in equity, the one as if it were money and the other as if it were land. If, on the other hand, the equitable conversion be caused by an unilateral covenant to purchase and

¹ Seeley v. Jago, 1 P. Wms. 389. In the converse case, however, of a trust to sell land, and divide the proceeds of the sale among several persons, any one of the persons interested may insist upon a sale against the wishes of all the others. Deeth v. Hale, 2 Mol. 317; Trower v. Knightley, 6 Madd. 134.

² See *supra*, page 248.

settle land upon the covenantor's wife and the issue of the marriage, such covenant will constitute the first step towards an alienation by the covenantor of the money to be laid out by him, and towards the acquisition, not by the covenantor, but by his wife and issue, of the land to be purchased. How are the wife and issue to acquire the land? Of course, they are to acquire it through the covenant to settle it upon them; and hence it is that the latter covenant is indispensable to the equitable conversion; and hence it is, also, that the covenant to purchase and settle land causes an equitable conversion only to the extent of the right or rights which it creates to have the land settled. To that extent, however, a covenant to purchase and settle land constitutes a complete step towards the alienation of the money by the covenantor and the acquisition of the land by the wife and issue, and hence, to that extent, it causes an equitable conversion of the money into land. The reader will observe, however, that, under a covenant to purchase and settle land, a question always arises as to the extent of the equitable conversion which the covenant causes, while, under a contract for the purchase and sale of land, no such question can ever arise, a conversion in equity of the entire interest in both the money and the land being a necessary consequence of the contract.

Finally, if the equitable conversion be caused by a trust or duty to convert land into money, or money into land, such trust or duty, each being unilateral, will constitute the first step towards the alienation by the creator of the trust or duty, of the thing to be converted, and also the first step towards the acquisition, not by the creator of the trust or duty, but by the *cestui que trust*, or the person for whom, or in whose favor, the duty is to be performed, of the thing into which the conversion is to be made, or of some interest in it. How, then, is such an acquisition to be made? Only by means of a gift from the creator of the trust or duty, and this is another reason why some gift by the creator of the trust or duty of the thing into which the conversion is to be made, is indispensable to the equitable conversion, and also why the equitable conversion can be coextensive only with such gift. To the extent of such gift, however, the trust or duty to convert land into money, or money into land, constitutes a complete step towards an alienation of the thing to be converted, and an acquisition of the thing into which the conversion is to be made; and hence, to that extent, it necessarily causes an equitable conversion of land into

money, or of money into land. In this case also, as in that of a covenant to purchase and settle land, a question always arises as to the extent of the equitable conversion caused by the trust or duty.

We have seen that an unilateral covenant to purchase and settle land can, upon principle, cause an equitable conversion only in favor of persons on whom the land is covenanted to be settled, — not in favor of the covenantor, or those claiming under him. So also, and for the same reason, an unilateral trust or duty to convert land into money, or money into land, can, upon principle, cause an equitable conversion only in favor of the *cestui que trust*, or the person for whom, or in whose favor, the duty is to be performed, — not in favor of the creator of the trust or duty, or of those claiming under him. We have also seen, however, that, in respect to a covenant to purchase and settle land, the authorities do not at all support this view, but hold that every covenant to lay out money in the purchase of land, and to settle the land, causes an equitable conversion of the money into land as much in favor of the covenantor and those claiming under him, as it does in favor of those on whom the land is covenanted to be settled and those claiming under them; and it may now be added that the authorities present the same view in respect to equitable conversions caused by a trust or duty to convert land into money, or money into land.¹

We have also seen that according to the authorities the extent of the equitable conversion caused by a covenant to purchase and settle land is measured, not by the extent of the right or rights which the covenant creates in the land to be purchased, but by the extent of the actual conversion which the covenant makes necessary. How do the authorities answer this question in respect to an equitable conversion caused by a trust or duty to convert land into money, or money into land? Or, rather, how do they answer it in respect to such a trust or duty created by a will, for in respect to a trust created by deed they do not answer it at all.

C. C. Langdell.

CAMBRIDGE, Jan. 14, 1905.

[To be continued.]

¹ *Smith v. Claxton*, 4 Madd. 484 (second devise); *Jessopp v. Watson*, 1 Myl. & K. 665; *Hatfield v. Pryme*, 2 Coll. 204; *Clarke v. Franklin*, 4 Kay & J. 257; *Richerson, In re*, [1892] 1 Ch. 379.

THE DEVELOPMENT OF JURISPRUDENCE DURING THE PAST CENTURY.¹

THE term "jurisprudence" has been used with so many meanings, and each meaning is so vague, that it is necessary at the outset of any discussion of it to limit in some way the meaning intended to be put upon it. By jurisprudence, as used in the programme of this Congress, I understand to be meant the whole body of law of the European and American nations, regarded as a philosophical system or systems; in short, the science of justice, as practised in civilized nations. My own topic, therefore, is to describe the changes in the law or in the understanding of the law in the civilized world during the past century.

So broad a subject cannot, of course, be treated exhaustively, nor can any part of it be examined in detail. My effort will be merely to suggest, in case of a few branches of law where the changes seem to be typical, the course and reason of those changes.

If we compare the condition of the law at the beginning of the century with its present condition, we shall gain some idea of the amount of change in the law itself and its administration. In England conservatism and privilege and the dread inspired in the heart of the people by the excesses of the French revolution conspired to retain in the law the medieval subtleties and crudities, though the reason of them had been forgotten and the true application of them often mistaken. The criminal law was administered with ferocity tempered by ignorance; all the anomalies and mistakes which have disfigured its logical perfection are traceable to the period just before the beginning of the last century. Criminal procedure was still crude and cruel. The accused could neither testify nor be assisted by counsel; legally, death, actually, a small fine or at most transportation, was the punishment for most serious offenses. The amount of crime in proportion to the population was enormously greater than now; there were no preven-

¹ Address delivered before the Congress of Arts and Science, at St. Louis, September 20, 1904, in the Division of Jurisprudence.

tive measures, no police, not even street lights. The law of torts occupied almost as small a place as it did in the proposed codes; the law of contracts was so unformed that it was not certain whether Lord Mansfield's doctrine that a written commercial agreement needed no consideration, would prevail or not. Business corporations were hardly known; almost the whole field of equity was hidden by a portentous cloud. Lord Eldon had just become chancellor. What the law of England was, such with little difference was the law of our own country. Its application to the complex life of the present was not dreamed of; and it had to be greatly changed before it could be adapted to the needs of to-day. Yet to say, as did Bentham, that it was rotten to the core and incapable of amendment was grotesquely incorrect; to say, as one of his latest disciples did, that it was the laughing-stock of the Continental nations is strangely to misread history. In 1803, with all its imperfections and crudities, it was probably the most just and humane system of law under which human beings were then living.

On the Continent, feudal rights characterized civil law; torture was the basis of the administration of criminal law. And in no country of any size had the people yet obtained what had been given to Englishmen by their greatest king more than six hundred years before, — a common law. Each province throughout southern and western Europe had its custom, each land-owner his own jurisdiction. The rigor of the criminal law had been somewhat modified in France by the legislation of the revolution, and just at the beginning of our century the Civil Code, first of the French Codes, was adopted. These codes, temporarily or permanently impressed on a large part of Europe outside of France, constituted the beginning of modern legislative reform.

The spirit of the time molds and shapes its law, as it molds and shapes its manner of thought and the whole current of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man's conception of right changes from age to age, as his knowledge grows. The spirit of the age, therefore, affecting as it must man's conception of right, affects the growth both of the common and of the statute law. But the progress toward ideal right is not along a straight line. The storms of ignorance and passion blow strong, and the ship of progress must beat against the wind. Each successive tack brings us nearer the ideal, yet each seems a more or less abrupt departure

from the preceding course. The radicals of one period become the conservatives of the next, and are sure that the change is a retrogression; but the experience of the past assures us that it is progress.

Two such changes have come in the last century. The eighteenth had been, on the whole, a self-sufficient century; the leaders of thought were usually content with the world as it was, and their ideal was a classical one. The prophets of individuality were few and little heeded. But at the end of the century, following the American and French revolutions, an abrupt change came over the prevailing current of thought throughout the civilized world; and, at the beginning of the period under discussion, the rights of man and of nations become subjects not merely of theoretical discussion but of political action. The age became one of daring speculation. Precedent received scant consideration. The American revolution had established the right of the common people to a voice in the government. The French revolution had swept feudal rights from the civilized world. Although the French Republic was just passing into the French Empire, it was an empire which belonged to the people, and one of which they were proud. The Emperor was the representative and the idol, not of an aristocracy, but of his peasants and his common soldiers. The dreams of Napoleon himself, to be sure, were not of an individualistic paradise, where each man's personality should have free play and restraint on his inclinations be reduced to the minimum; but so far as he was able to put his centralizing ideals into execution he raised but a temporary dam, which first spread the flood of liberty over all Europe and was finally swept away by the force of the current.

Starting from this point, the spirit of the time for more than a generation was humanitarian and individualistic. In political affairs independence was attempted by almost every subordinate people in the civilized world, and was attained by the South American colonies, by Greece, and by Belgium. In religion freethinking prevailed, and every creed was on the defensive. In society women and children were emancipated. Slavery was abolished, and the prisons were reformed. It was a destructive rather than a constructive age, and its thinkers were iconoclasts.

But a change, beginning with the second third of the century, was gradually accomplished. The application of the forces of steam and electricity to manufacture and transportation has had a greater effect on human life and thought than any other event

of modern times. The enormous power exerted by these forces required great collections of labor and capital to make them effective. Association became the rule in business affairs, and as it proved effectual there, the principle of association became more and more readily accepted in social and political affairs, until it has finally become the dominating idea of the time. The balance has swung; the men of our time are more interested in the rights of men than in the rights of man; the whole has come to be regarded as of more value than the separate parts. Beginning with the construction of railroads, the idea attained a firm standing in politics in the sixties. Whereas before that time the movement had been toward separation, now it was toward consolidation. People felt the tie of nationality stronger than the aspiration for individual development. The unification of Italy and of Germany, the federation of Canada, the prevalence of corporate feeling in America which, first passionately expressed by Webster, prevailed in '65, mark the principle of association in political affairs. In business the great combinations of capital have been the salient features of the change.

Professor Dicey, in a most suggestive series of lectures a few years ago, pointed out many ways in which the English law had been affected by this progress of thought during the nineteenth century. Since the thought of the whole world has been similarly affected we should expect to find, and we do find, that not merely English law but universal jurisprudence has developed in the direction of the progress of thought, — during the first period in the direction of strengthening and preserving individual rights, both of small states and of individuals, during the second period in the direction of creating, recognizing, and regulating great combinations, whether of states or of individuals. Let us develop this line of thought by examining the progress of law in a few striking particulars.

The most striking development of the law of nations during the last century has been in the direction of international constitutional law, if I may so call it, rather than of the substantive private law of nations. At the beginning of the period the fundamental doctrine of international law was the equality of all states great or small, and this idea, as one might expect, was fully recognized and insisted on during the first fifty years of the century. There was little development in the law otherwise. Each nation adopted and enforced its own idea of national rights, and was powerless to

force its ideas upon other nations. When, at the beginning of the century, France set up her absurd notions of her own national rights, other nations were powerless to restrain or to teach her. There was no international legislature or court, no method of declaring or of developing the law of nations. Each state was a law to itself, giving little more than lip service to a vague body of rather generally accepted principles. The alliance to conquer Napoleon, to be sure, brought several great nations into a common undertaking; but this alliance, while of political importance, added nothing to the growth of the law.

In the last half of the century, however, there has been an enormous development of combinations, both to affect and to enforce law; and resulting therefrom a development of the substance of the law itself. The associations of civilized nations to suppress the slave trade both made and enforced a new law. The concert on the Eastern question, the Congress of Paris, the joint action of the Powers in the case of Greece and Crete, and in the settlement of the questions raised by the Russo-Turkish and Japanese wars, the Geneva and the Hague conventions, are all proofs of the increasing readiness of the Great Powers to make, declare, and enforce doctrines of law; and they have not hesitated, in case of need, to make their action binding upon weaker states, disregarding, for the good of the world, the technical theory of the equality of all states. While all independent states are still free, they are not now regarded as free to become a nuisance to the world. Perhaps the most striking change in the substance of international law has been the extraordinary development of the law of neutrality. A hundred years ago the rights and the obligations of neutrals were ill defined and little enforced. To-day they form a principal theme of discussion in every war, and the neutral nations, for the good of the whole world, force the belligerents to abate somewhat from their freedom of action.

It may be worth while, in order to see how far this constitutional change has progressed, to look for a moment at the present condition of the constitutional law of nations. We have a body of states known as the "Great Powers" which have assumed the regulation of the conduct of all nations. In this hemisphere the United States is sponsor for all the smaller independent nations. In Europe the Great Powers exercise control over the whole of Europe and Africa and a large part of Asia, while in the extreme Orient Japan seems likely to occupy a position similar to our own

in the western hemisphere. The constitutional position of this Confederation of Powers is not unlike that of the states of the American Confederation in 1780, and in certain ways it is even further developed. Its legislation is not in the hands of a single permanent congress, but it is accomplished by mutual consultation. For action, as Lord Salisbury once informed the world, "unanimous consent is required," as was the case in our Confederation. Executive power has been exercised several times, either by the joint show of force by two or more powers, or by deputing one power to accomplish the desired result. The judiciary, as a result of the Hague Convention, is much further developed than was that of the Confederation, even after 1781. All of this has been accomplished in fifty years, and the prospect of peace and prosperity for the whole world as a result of its further development is most promising.

The progress that has been described is well indicated by the course of the movement for codification.

Just a hundred years ago the first of the French Codes was adopted. These codes had two purposes: first, to unify the law which, before the adoption of the codes, had differed in every province and every commune of France; second, to simplify it so that every one might know the law. The first purpose appealed most strongly to lawyers and to statesmen. The second appealed to the people generally. Whatever reason weighed most with Napoleon, there is no doubt which made the codes permanent. The people of France, and of the other countries where they were introduced, hailed them as creating a law for the common people. They persisted in most countries where they had been introduced by Napoleon's arms in spite of the later change of government; whether the country on which they had been imposed was Flemish, German, Swiss, or Italian, it retained the codes after the defeat of Napoleon, and they have remained almost the sole relic of his rule, the only governmental affairs which retain his name, and, except Pan-Germanism, the only lasting monument of his labor. They persisted because they were in consonance with the individualistic feelings of the times.

Bentham urged codification on England for the same reason:

"That which we have need of (need we say it?) is a body of law, from the respective parts of which we may each of us, by reading them or hearing them read, learn, and on each occasion know, what are his rights, and what his duties."

The code, in his plan, was to make every man his own lawyer, and the spirit of individualism could go no further than that. Conservative England would not take the step which Bentham urged, but a code prepared by one of his disciples upon his principles was finally adopted (by belated action) in Dakota and California, and was acclaimed as doing away with the science of law and the need of lawyers.

The result of the adoption of the French Codes and the Benthamite Codes has been far from what was hoped and expected. They were to make the law certain and thus diminish litigation and avoid judge-made law. That litigation has not been diminished by codification can easily be shown by comparing the number of reported cases in the states which have adopted the codes, and in states which have not adopted them. As a result of this comparison, we find that France has over fifteen volumes a year of reports of decisions on points of law, four of them containing over 2500 cases each; England has about ten volumes a year of reports of decisions on points of law, containing in all about 900 cases. California has from three to four volumes of reports of decisions on points of law each year; 100 since the adoption of the code in 1871; Massachusetts has two to three volumes of reports of decisions on points of law, 76 in all during the same period. As bearing on the avoidance of judge-made law, which Bentham, by a curious ignorance one is perhaps not quite justified in calling insane, regarded as inferior to legislature-made law, the result of the codes in one or two points will be instructive. The French Code provided that all actions *ex delicto* should be decided by the court as questions of fact, without appeal for error of law. Notwithstanding this provision, recourse has been had to the Court of Cassation and a system of law has been built up on judicial decisions similar in character and comparable in amount to that built up in England in the same way during the same period. There is, for instance, a French law of libel which must be learned, not from the code but from the pages of Dalloz and the *Pandectes Françaises*, just as our law of libel must be studied in the law reports and the digests. Even if a point is apparently covered by an express provision of the code, judicial decisions may affix a meaning to the provision which can be known only to a student of law. Thus the French Code appears to lay down the proposition that capacity to contract is governed by the law of the party's nation, yet the French courts refuse to apply this principle, and instead of it apply

the French law of capacity in each case where the other party to the agreement is a Frenchman who acted *bona fide* or where the party to be bound was commorant and doing business in France. These are two examples only out of many that might be cited of the failure of the code to fulfill the hopes of its individualist sponsor. If we leave the French Code and come to those in our own country, we shall find the same process going on. The law of California has been developed in much the same way since the adoption of the code as before, and the common law decisions of other states are as freely cited by her courts as authority as if her own law had never been codified. The uncertainty and confusion caused by the adoption of the New York Civil Code of Procedure is a well-known scandal.

It is true that Bentham objected to the French Code as imperfect and made upon the wrong principle, and that Field objected to the New York Code of Civil Procedure as finally adopted. These objections were most characteristic. Every codifier desires not merely a code but his own code, and will not be satisfied with any other. Hence it follows that no complete code can be adopted which would be satisfactory to many experts in law. Furthermore, no codifier will be satisfied to accept the judgment of a court or any body of other men upon the meaning of his code, nor to accept the interpretation of the executive department on the proper execution of the law. It will follow that each codifier of the Benthamite type must be legislature, judge, and sheriff, and the logical result (like the logical result of all individualism carried to an extreme) is anarchy.

This failure of the hope of the individualistic codifiers and the change in the spirit of the age have affected our ideal of codification. The purpose of the modern codifiers is not to state the law completely, but to unify the law of a country which at present has many systems of law, or to state the law in a more artistic way. In other words, the spirit of the modern codifiers is not individualistic but centralizing. Thus the modern European codes of Italy, Spain, and Germany were adopted in countries where a number of different systems of law prevailed, and the purpose of codification in each state was principally to adopt one system of law for the whole country, and incidentally to make the expression of the law conform to the results of legal scholarship. The same purpose is at the basis of the American Commission for the Uniformity of Legislation. The purpose of the English codifiers appears to be

merely an artistic one. It cannot be better expressed than by the last great disciple of Bentham, Professor Holland. The law expressed in a code, he says, "has no greater pretensions to finality than when expressed in statutes and reported cases. Clearness, not finality, is the object of a code. It does not attempt impossibilities, for it is satisfied with presenting the law at the precise stage of elaboration at which it finds it; neither is it obstructively rigid, for deductions from the general to the particular and 'the competition of opposite analogies' are as available for the decision of new cases under a code, as under any other form in which the law may be embodied. . . . It defines the terminus *a quo*, the general principle from which all legal arguments must start. . . . The task to which Bentham devoted the best powers of his intellect has still to be commenced. The form in which our law is expressed remains just what it was."

Such a code as he describes is really very far from the ideal of Bentham. It does not do away with judge-made law; it does not enable the individual to know the law for himself; its only claim is that it facilitates the acquisition of knowledge by the lawyer by placing his material for study in a more orderly and logical form. The cherished ideals of the reformers of a hundred years ago have been abandoned, and an ideal has been substituted which is quite in accordance with the spirit of our own times.

The most striking characteristic of the progress of jurisprudence in the first half of the century was its increasing recognition of individual rights and protection of individuals. Humanity was the watchword of legislation; liberty was its fetic. Slavery was abolished, married women were emancipated from the control of their husbands, the head of the family was deprived of many of his arbitrary powers, and the rights of dependent individuals were carefully guarded. In the administration of criminal law this is seen notably. At the beginning of the century torture prevailed in every country, outside of the jurisdiction of the common law and the French Codes, but torture was abolished in every civilized state during this period. Many crimes at the beginning of the century were punishable with death. Few remained so punishable at the end of fifty years. The accused acquired in reality the rights of an innocent person until he was found guilty. He could testify, he could employ counsel and could be informed of the charge against him in language that he was able to understand; and, even after conviction, his punishment was inflicted in accord-

ance with the dictates of humanity. Imprisonment for debt was abolished. Bankruptcy was treated as a misfortune, not a crime.

As with the emancipation of individuals, so it was with the emancipation of states. The spirit of the times favored the freedom of the oppressed nations as well as of individual slaves. The whole civilized world helped the Greeks gain their independence. The American people hailed with touching unanimity the struggles of Poland and of Hungary for freedom, and even the black republics of the West Indies were loved for their name, though they had no other admirable qualities.

While there has been little actual reaction in the last half-century against this earlier development of the law in the direction of liberty, there have been few further steps in that direction. The zeal for emancipation has in fact spent its force, because freedom, quite as great as is consistent with the present state of civilization, has already been obtained. So far as there has been any change of sentiment and of law in the last generation, it has been in the direction of disregarding or of limiting rights newly acquired in the earlier period. France, which secured the freedom of Italy, threatens the independence of Siam; England, which was foremost in the emancipation of the slaves, introduces coolie labor into the mines of South Africa; America, which clamored for an immediate recognition of the independence of Hungary, finds objectors to recognizing the independence of Panama and refuses independence to the Philippines. In the criminal law there has been no reform, though there has been much improvement, since 1850. Married women have obtained few further rights, principally because there were few left for them to acquire, and, while we have freed our slaves, we have encouraged trade unionism. In short, the humanitarian movement of two generations ago which profoundly affected the law of the civilized world for fifty years has ceased to influence the course of jurisprudence.

The most characteristic development of the law during the last fifty years has been in the direction of business combination and association. A few great trading companies had existed in the middle ages; the Hanse merchants, the Italian, Dutch, and English companies wielded great power. They were exceptional organizations, and almost all had ceased to act by 1860. The modern form of business association, the private corporation with limited liability, is a recent invention. Such corporations were created by special action, by sovereign or legislature, in small

though increasing numbers all through the last century; but during the last generation every civilized country has provided general laws under which they might be formed by mere agreement of the individuals associated. Now the anonymous societies of the Continent, the joint-stock companies of England and her colonies, and the corporations of the United States, all different forms of the limited liability association for business, have engrossed the important industries of the world. Different countries are competing for the privilege of endowing these associations with legal existence. Corporations are formed in one state to act in all other states or in some one other state, or (it may be) anywhere in the world except in the state which gave them being; and so in the last fifty years an elaborate law of foreign corporations has grown up all over the civilized world. But the corporation is only one form of business combination which has become important. Greater combinations of capital have been formed, that is, the so-called trusts; great combinations of laboring men have been formed, the so-called unions; and the enormous power wielded by such combinations has been exercised through monopolies, strikes, and boycotts. All these combinations have been formed under the law as it has been developed and all are legal. Furthermore, the great business operations have come to depend more and more upon facilities for transportation, and great railroads and other common carriers have come to be equal factors with the trusts and the unions in the operations of modern business. The first effect, then, of the ideas of the present age upon the law is its development in the direction of forming great commercial associations into legal entities wielding enormous commercial power.

If such associations had been formed seventy-five years ago, the spirit of the age would have left them free to act as they pleased. Freedom from restraint being the spirit of the times, it would have been thought unwise to restrain that freedom in the case of a powerful monopoly as much as in the case of a poor slave. But at the present time we are more anxious for the public welfare than for the welfare of any individual, even of so powerful a one as a labor union or trust, and in accordance with the genius of our age the law has developed and is now developing in the direction of restraint upon the freedom of action of these great combinations, so far as such restraint is necessary to serve the public interest. For centuries innkeepers and carriers have been subject to such

restraint, though little control was in fact exercised until within the last fifty years. To-day the law not only requires every public service company to refrain from discrimination and from aggrandizing itself at the expense of the public, but the trusts and the unions also are similarly restricted. The principle of freedom of action, the courts in all questions now agree, rests upon the doctrine that the interests of the public are best subserved thereby, and applies only so far as that is true. When freedom of action is injurious to the public it not only may be, but it must be, restrained in the public interest. That is the spirit of our age, and that is the present position of the law when face to face with combinations such as have been created in the last generation. An interesting example of restriction is that almost universally placed upon foreign corporations. In the competition of certain states for the privilege of issuing charters, great powers have been conferred, which were regarded as against the public policy of the states in which the corporations desired to act. Strict regulations for the action of such corporations have resulted, imposed in the European countries usually by treaty, in England and America by statute.

A summary of the history of jurisprudence in the last hundred years would be incomplete without a consideration of legal scholarship during the period and of the results of the scientific study of law. The reformers of a hundred years ago were profoundly indifferent to the history of law. Bentham, the founder of so-called analytic jurisprudence, wished not to understand the existing law, but to abolish it root and branch, and to build a new system, the principles of which should be arrived at merely by deductive reasoning. It seems to us now almost impossible that such a man should have believed himself more capable of framing a practicable and just system of law than all his wise predecessors, but Bentham was a marvel of egotism and self-conceit, and his reasoning powers were far from sound. He seems to have been incapable of understanding the nature of law. "If," he said, "we ask who it is that the Common Law has been made by, we learn to our inexpressible surprise, that it has been made by nobody; that it is not made by King, Lords, and Commons, nor by anybody else; that the words of it are not to be found anywhere; that, in short, it has no existence; it is a mere fiction; and that to speak of it as having any existence is what no man can do, without giving currency to an imposture." Employing the same reasoning, he would have concluded that justice, not being made by King, Lords, or Commons,

nor by anybody else, had no existence; that truth, since the words of it are not to be found anywhere, is a mere fiction. But these defects are too often found in reformers. The humanitarian age brought enormous benefits to the world, but its ideas were often ignorant, crude, and impracticable, and needed to be modified by the better instructed minds of the present constructive age. While Bentham was at the height of his power, the Historical School of Jurists in Germany was beginning its great work. Savigny was already preaching the necessity of understanding the history of law before it was reformed. Mittermaier and Brunner were to follow and carry on the work of the master. The unity of the past and present, and the need of conforming the law of a people to its needs were among their fundamental principles. Bentham had said, "if a foreigner can make a better code than an Englishman we should adopt it." Savigny said, with greater truth and knowledge of human nature, that no system of law, however theoretically good, could be successfully imposed upon a people which had not by its past experience become prepared for it.

The impulse given to legal study by the work of Savigny and his school has in the last generation spread over the civilized world and profoundly influenced its legal thought. The Italians, the natural lawyers of the world, have increased their power by adopting his principles. In England a small but important school of legal thinkers have followed the historical method, and in the United States it has obtained a powerful hold. The spirit of the age, here too, has supported it. We are living in an age of scientific scholarship. We have abandoned the subjective and deductive philosophy of the middle ages, and we learn from scientific observation and from historical discovery. The newly accepted principles of observation and induction, applied to the law, have given us a generation of legal scholars for the first time since the modern world began, and the work of these scholars has at last made possible the intelligent statement of the principles of law.

Joseph H. Beale, Jr.

CAMBRIDGE, Jan. 16, 1905.

THE RIGHT OF A BELLIGERENT TO DESTROY A CAPTURED PRIZE.

A CENTURY ago the destruction of captured prizes was not uncommon. During the Revolutionary War and the War of 1812 our cruisers destroyed their prizes;¹ and at the outbreak of the War of 1812 our government ordered the destruction of captured vessels, unless in extraordinary cases that clearly warranted an exception.² "The commerce of the enemy," it was said, "is his most vulnerable point, and its destruction the main object. Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to send them in. A single cruiser, if ever so successful, can man but few prizes, and every prize is a serious diminution of her force; but a single cruiser destroying every captured vessel has the capacity of continuing in full vigor her destructive power, so long as her provisions and stores can be replenished either from friendly ports or from the vessels captured." These instructions would now be considered barbarous; they would never have been given if the practice of civilized nations had then been settled to the contrary.

During our Civil War it was the practice of the Confederate cruisers to destroy their prizes;³ and at the close of the war it was proposed to proceed against Captain Semmes for damages; but in view of our former practice, the government was advised against taking such action.⁴ Sentiment had so changed, however, that a justification of the acts of the Confederate cruisers was thought necessary, and it was rested upon the impossibility of taking the prizes into port for adjudication by a prize court, on account of the blockade maintained by our government. The validity of this justification seems to be admitted by some of the authorities,⁵ but is rejected by others.⁶

¹ Hall, 4th ed., 475; Woolsey, 4th ed., appendix iii, n. 13.

² Wheaton, 4th Eng. ed., by Atlay 506; Hall 475; Woolsey, appendix iii, n. 13.

³ Wheaton 506; Hall 475-476; Woolsey, appendix iii, n. 13; Mountague Bernard, *Neutrality of Great Britain* 419.

⁴ Wheaton 506.

⁵ Bernard, *Neutrality of Great Britain* 419; Hall 475-476; Bonfils § 1415.

⁶ Bluntschli, 2nd French ed., § 672; Calvo § 3031.

In a paper read before the Juridical Society in 1864,¹ Clark, the reporter of the House of Lords, says: "The first perpetration of this act occasioned a thrill of astonishment if not of horror." The reason given, — lack of home ports, — he adds, is the reason of the buccaneer. "No nation has the right to put itself into a certain condition, without being bound to take all the consequences which legitimately flow from the condition. . . . A nation that goes to war must submit to all the disadvantages necessarily consequent on its condition and circumstances. If it has no means by which it can reach its enemy's territory except by violating the territories of countries at peace with its enemy and itself, it has no right on the ground of its own profit and advantage to violate those territories."

As late as 1878, during the war with Turkey, Russia was accused of sending out fast steamers which avoided Turkish cruisers but captured and burned Turkish merchantmen; but this conduct was denounced at the time as an undeniable violation of international law.

The property of the citizens or subjects of an enemy captured at sea is in theory the property of the government of the captor.² The right to destroy it is a consequence of the right of property. The former owners are not interested; the fact that they are enemies deprives them of all claim to the captured vessel. In former days it was to the interest of the captors to conceal the fact of capture, seize for themselves what was readily carried away, and destroy what could not be secretly disposed of. The temptation was therefore strong to sink or burn a vessel captured at sea. On the other hand, the interest of the captor's own government in the prize required that it should be brought into port for adjudication; and it was for the protection of the government that the French Ordonnance of 1681 prohibited the sinking of captured vessels and the landing of prisoners on islands or remote coasts; but it is entirely clear that this prohibition was not dictated by any tenderness for the rights of private property or of neutrals.³

At the time of the Seven Years War, it became the practice of France and England to concede to the captors the rights of the

¹ 3 Juridical Society Papers 28.

² The *Dos Hermanos*, 10 Wheat. (U. S.) 306; The *Siren*, 13 Wall. (U. S.) 389; The *Emulous*, 1 Gall. (U. S. C. C.) 569; Hall 474.

³ Hall 476, n.; Calvo § 3031, citing Pistoye and Duverdy.

government to the prize,¹ and this practice has now become general. By the statute of the United States prior to 1899, where the prize is of superior or equal force, the net proceeds of the property condemned are to be decreed to the captors; when of inferior force, one-half is to be decreed to the United States.² The title does not pass to the captors until condemnation. Since the right to destroy rests upon the right of property and the right of property until condemnation is in the government of the captor, the destruction can be authorized only by the government.

The reason which formerly might be relied upon as a justification for the destruction of prizes without condemnation has not now the same force. The captors who destroy a prize before condemnation, even if it is a lawful prize, are not destroying their own property, and good policy on the part of the captor's own government requires that the prize should be brought in for adjudication, although for a different reason from that which dictated the Ordonnance of 1681. In the present state of commerce, the property of belligerents and neutrals is usually so commingled that the immediate destruction would probably involve the government in controversy with neutrals. This danger has become greater since the Declaration of Paris in 1856 established the rule that a neutral cargo was protected, even under an enemy's flag.

The rule and the reasons for it are well stated by Lord Stowell in the case of *The Felicity*.³ The capture occurred January 1, 1814; the litigation arose after the treaty of peace between England and the United States in 1815; the case was decided in 1819. Lord Stowell said:

"Regularly a captor is bound by the law of his own country, conforming to the general law of nations, to bring in for adjudication, in order that it may be ascertained whether it be enemy's property; and that mistakes may not be committed by captors, in the eager pursuit of gain, by which injustice may be done to neutral subjects, and national quarrels produced with the foreign states to which they belong. Here is a clear American vessel and cargo, alleged by the claimants themselves to be such, and consequently the property of enemies at that time. They share no inconvenience by not being brought in for the condemnation which must have followed if it were mere American property; and the captors fully justify themselves to the law of their own country which prescribes the bringing in, by shewing that the immediate service in which they were engaged, that of watching the enemy's

¹ Hall 474 n.

² Rev. Stat. § 4630.

³ *The Felicity*, 2 Dod. 381, at pp. 385, 386.

ship of war the President, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property."

The question of the right to destroy enemy's property without an adjudication by a competent tribunal is, as Lord Stowell clearly shows, a question between the captors and their own government.

Although the practice of destroying under any circumstances enemy's vessels captured as prize, is condemned by some publicists as "a rigorous act,"¹ as "an exceptional exercise of an extreme right,"² as "not fully justified in any case,"³ as "barbarous,"⁴ and is restricted by others to cases of absolute necessity, to cases of "*vis major*," or "certain necessities of war," it is a right that is even at the present day universally recognized. As Calvo⁵ says: "The right of the captor remains intact in presence of circumstances of *vis major* or certain necessities of war. The only point which may give rise to some discussion, which even demands, in our opinion, a reform of international law, is a definition of these circumstances and these necessities. There is room for more severe judgment of the motives which have determined the destruction of the prize. The *vis major* or the necessity should be established beyond all doubt and all serious criticism, by proofs of a character to justify fully the conduct; in a word, it must be demonstrated that he [the captor] could not act otherwise than he acted."

Several attempts have been made to formulate rules determining in what cases the captor may destroy the prize. The whole subject was considered by a commission for the Institute of International Law between 1875 and 1882, and in the latter year at the Turin Congress the Institute adopted rules justifying the act in the following cases:⁶

1. When it is not possible to keep the ship afloat, because of its bad condition, the sea being tempestuous;

¹ Calvo § 3023.

³ Boeck, cited by Calvo.

⁵ Calvo § 3034.

⁶ Hall 477, n.; Annuaire de l'Institut (1883) 221.

² Bluntschli § 672.

⁴ Woolsey, appendix iii, n. 13.

2. When the ship sails so badly that it cannot follow the war-ship, and can be easily recaptured by the enemy;
3. When the approach of a superior hostile force causes fear of recapture of the captured vessel;
4. When the ship of war cannot put on the captured vessel a sufficient crew without diminishing too much that which is necessary to its own security;
5. When the port to which it would be possible to conduct the captured ship is too remote.

Bonfils adds that there are other cases resulting from instructions or other circumstances, but leaves these circumstances undefined.¹

These rules do not justify destruction on account of the insignificant value of the prize, as was suggested by Valin;² nor do they permit the fact that the captor's home ports are blockaded to excuse the act, as was urged in behalf of the Confederate cruisers, although the latter circumstance is recognized by Bonfils as a justification.

The Russian rules of 1869, article 108,³ and of 1895, article 21,⁴ are substantially the same as the rules of the Turin Conference, but they recognize the small value of the prize as a circumstance in connection with the remoteness of the ports to which it could be taken, justifying its destruction.

The destruction of a vessel belonging to a citizen of the hostile belligerent is, however, very different from the destruction of a neutral vessel. Enemy's property at sea is lawful prize, and its destruction is a question that concerns only the captor and his own government; the hostile government cannot complain. Neutral property is not ordinarily lawful prize, and the neutral government is bound to maintain the rights of its citizens. To justify even the capture of a neutral ship, facts must be established which make it lawful prize.

The circumstances which make a neutral vessel lawful prize are thus stated by one of the most recent French authorities:⁵

1. When it opposes resistance or prepares to resist visit, when summoned.
2. When the commander cannot prove his neutral character.
3. When the state of the ship or the declarations of the captain cause grave suspicions; if he has no papers aboard; if they are

¹ Bonfils § 1415.

² Hall 476, n.

³ 11 *Revue de Droit International* (1879) 632; Bonfils § 1415.

⁴ Bonfils § 1415.

⁵ Bonfils § 1674.

double, or incomplete because part have been thrown in the sea; when circumstances cause a presumption that they are simulated.

4. When the ship has deviated from her route and the captain is unable to give good reasons (*fondées et justificatives*) for the change of route, causing a suspicion that the apparent destination is false, and the cargo includes contraband of war.

5. When the ship is destined to an enemy's port, even one not blockaded, and has on board merchandise contraband of war, troops, or enemy's despatches.

6. When the ship has attempted to violate a blockade of which notice has been regularly given.

Although the fifth case stated by Bonfils justifies condemnation of a neutral vessel for carrying contraband of war to an enemy's port, it seems that the weight of authority is contrary to the view he expresses, in the case of a vessel carrying contraband merchandise.

Lord Stowell¹ says: "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles." He admits, however, that the ancient practice was otherwise, and was perfectly defensible on every principle of justice.

Wheaton² says: "In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated."

Justice Story³ says: "According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation on their part in a meditated fraud upon the belligerents."

Bluntschli⁴ says that "a neutral ship carrying contraband can be detained only as long as is necessary to effect the seizure of the contraband. It cannot be captured when the merchandise forms

¹ The Neutralitet, 3 Rob. A. 295; Scott's Cases 767.

² Wheaton § 505, p. 678.

³ Carrington v. Merchants' Insurance Co., 8 Pet. Adm. (U. S. Dist. Ct.) 495; Scott's Cases 769, 772.

⁴ Bluntschli § 810.

only a small part of the cargo and may be confiscated separately. The ship can only be declared good prize when its owner has known that the ship carried contraband and authorized it."

It is recognized that where the owner of the contraband goods is also the owner of the vessel, the latter is subject to condemnation as prize.

The view expressed by Lord Stowell, Justice Story, Wheaton, and Bluntschli is certainly more consonant with modern ideas. It is unnecessarily harsh to hold that the owner of the vessel is involved in the guilt of the owner of the contraband merchandise, when he may be entirely innocent of any intent to injure the belligerent, and is probably merely pursuing his ordinary business of carrying merchandise for all who offer.

Under any view we take of what facts will make the neutral vessel lawful prize, the result depends upon inferences to be drawn from circumstances; upon whether the facts indicate good faith or bad faith toward the belligerents on the part of the neutral vessel. Even if we hold that the vessel may be condemned merely for carrying contraband, the question of whether or not the goods are contraband often depends upon the circumstances; some goods are of doubtful use and are sometimes contraband, sometimes not.

Dangerous as is the power conceded by the rules of international law to the captor to determine for himself that the prize is enemy's property, it is still more dangerous to concede to him the right to determine for himself that a neutral vessel has by misconduct made itself lawful prize. He is thereby made judge in his own cause under circumstances not calculated to lead to a fair judgment, and is put in a position to embroil his government in difficulties with the neutral governments without the compensation of doing that serious injury to the enemy which his duty to his government may, as Lord Stowell says, enjoin.

An examination of the authorities shows that although the right to destroy a neutral ship captured as a prize is perhaps not expressly denied, it is not established. The merchantmen destroyed by our cruisers during the Revolutionary War and the War of 1812 were British merchantmen; the merchantmen destroyed by the Confederate cruisers were the property of citizens of the United States; and all the cases cited in the works on international law seem to have been cases of enemy's ships. The difference between an enemy's property and a neutral's property was clearly stated by

Lord Stowell in the case already cited.¹ After referring to the duty to destroy enemy's property, he says:

"Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the captor's own State; to the neutral it can only be justified, under any such circumstances, by a full restitution in value."

The English editors of Wheaton² say: "If the prize is a neutral ship, no circumstances will justify her destruction before condemnation. The only proper reparation to the neutral is to pay him the full value of the property destroyed. Neutral cargoes are not always equally privileged."

Two cases of destruction of a neutral cargo in an enemy's ship arose during the War of 1870 between France and Germany. A French cruiser had captured and destroyed two German vessels, the *Ludwig* and the *Vorwaerts*. The owners of the cargo claimed that neutral goods were protected by the Declaration of Paris protecting neutral merchandise not contraband of war, even in an enemy's ship. The French court decided adversely to this claim. There can be no question of the correctness of this decision; for, as Calvo says, the Declaration of Paris declares only that neutral goods cannot be seized; to say that they cannot be seized or confiscated is very different from saying that they are inviolable. Private property on land cannot be confiscated by a belligerent, but private property, even of a neutral, is not exempt from the chances of war if injured, for example, by the bombardment of a hostile port. It would interfere with the recognized rights of a belligerent if he could not deal with an enemy's ship as he otherwise would be entitled to deal with it, simply because the exercise of his rights might necessarily injure a neutral cargo.³ The very fact that this question could be raised and that the justification of the act of the French cruiser was rested upon the fact that the injury was a necessary incident to the destruction of the enemy's ship is an indication that the French court would, if the question had arisen, have held the view as to the immunity of a neutral ship

¹ *The Felicity*, 2 *Dod.* 386.

² Wheaton § 507.

³ *Dalloz*, *Jurisprudence Générale* (1872), Pt. iii, p. 94, cited in Wheaton 507; Calvo § 3031.

from destruction without condemnation, which had been expressed more than fifty years before by Lord Stowell. This view is strengthened by the recognition of the rights of neutrals contained in the Declaration of Paris in 1856.

It seems from this review of the authorities that Calvo is right in saying that the publicists establish a distinction with reference to the character of the vessel, and make the legality or illegality of the act of destruction depend on the hostile character or the neutrality of the property destroyed.¹ Hall defends the right of the belligerent to destroy enemy's property, but adds: "Destruction of neutral vessels or of neutral property on board an enemy's vessel would be a wholly different matter."²

When the rules for the regulation of maritime prizes were under discussion by the Institute of International Law at Wiesbaden in 1881, it was proposed to amend the draft then presented by limiting the right of destruction to enemy's vessels with an exceptional right to destroy a neutral ship that was liable to condemnation as good prize, and the amendment was actually adopted that year, but was stricken out at the conference at Turin the following year. The report in the "*Annuaire de l'Institut*" fails to show whether it was stricken out because of the limitation of the right to enemy's ships, or because of the recognition of the right under exceptional circumstances in the case of neutral ships.³

The weight of authority is in favor of the view that neutral ships ought not to be destroyed before condemnation. This also accords with the modern tendency to respect private property at sea as it is respected on land, and with reason. The right of destruction rests upon the theory that the former owner loses nothing; since the property destroyed is subject to condemnation, he has nothing to gain by proceedings before a prize court; this is so only in the case of a lawful prize. In the case of an enemy's vessel, the hostile character of the vessel makes it lawful prize, and this is a fact readily determined, about which there can be little dispute. A neutral vessel, on the other hand, is lawful prize only under exceptional circumstances, and it requires a somewhat nice judgment to determine whether or not those circumstances exist, — a judgment which, on general principles, ought not to be entrusted to her

¹ Calvo § 3031.

² Hall 477, n. 762-763, citing *The Zee Star*, 4 Rob. A. 71; *The Felicity*, 2 Dod. 381; *The Leucade*, Spinks Pr. Ca. 221.

³ *Annuaire de l'Institut*, 1881, 1882.

captor. Civilization and reason plead in favor of the neutral, and considerations of expediency on the part of belligerent governments are on the same side. The risk of unnecessary complications and even of war is so great, and the injury to the enemy so indirect, that the power of destroying neutral vessels before condemnation ought not to be entrusted to the commanders of warships.

Francis J. Swayze.

THE EXTENSION TO THE ADMIRALTY OF THE FELLOW SERVANT DOCTRINE.

IT surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the courts undertaking to administer it, or there will be no certainty in the law, and litigation will become a lottery. Perhaps some persons consider it so now, but we must not encourage that notion. It will not do for a common law court to proceed in accordance with the admiralty law, nor for an admiralty court to proceed in accordance with the common law. The fact that in the United States the judges who exercise the admiralty jurisdiction have also common law jurisdiction makes it somewhat difficult to keep the two systems separate.

It was therefore with a feeling of relief that the bar, after seeing the common law doctrine of contributory negligence applied by a number of the district and circuit courts of the United States sitting in admiralty, beheld the doctrine cast out and discredited as an admiralty rule when the matter was finally brought to the attention of the Supreme Court of the United States.¹ It is with a corresponding feeling of regret that we now see another doctrine belonging exclusively to the common law admitted (luckily only to the extent of a *dictum* as yet) into the admiralty jurisprudence by that same court in the case of the *Osceola*.² This is the so-called fellow servant doctrine, by which an employer is not liable to one servant for injuries received through the negligence of another servant in the common employment. It is extended in the *Osceola* case to seamen on board of a ship, as follows: "All the members of the crew except perhaps the master are as between themselves fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew, beyond the expense of their maintenance and cure." (They are allowed maintenance and cure under another provision of the admiralty law.)

¹ *The Max Morris*, 137 U. S. 1.

² 189 U. S. 158.

This extension is entirely gratuitous, for the true and ancient admiralty rule, which the court next lays down, entirely disposes of the case: "The seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure whether the injuries were received by negligence or accident."¹

It is seen, therefore, that this doctrine of fellow servant is not necessary in admiralty, for a servant is prevented from recovering against an employer, or the ship, for the negligence of another servant, by the fact that the doctrine of *respondet superior*, when properly applied, does not have its full force in the admiralty. In fact, before the last twenty years no case of a recovery of a servant against an employer *in personam*² for the negligence of another servant in the employ of the same master, whether coming within the technical definition of a fellow servant or not, can be found in the reports of admiralty cases in the United States, and as Judge Addison Brown says, speaking of seamen:³ "No authority in the ancient or modern codes, in the recognized text books, or the decisions on maritime law can be found allowing such a recovery, and the absence of any authority holding the owner of the vessel liable is evidence of the strongest character that no liability under the maritime law exists." The same words could have been used at that time with truth of all actions *in personam* in admiralty by all servants against the employer for negligence of other servants as well as actions by seamen.

The first case in which the doctrine of fellow servant was applied by a court of the United States sitting in admiralty is *Halverson v. Nisen*,⁴ where Judge Hoffman applied it in the district court for the District of California, but he cites only common law authorities in support of it.

The Supreme Court has overruled in the *Max Morris* the decisions of many of the lower courts applying in admiralty the doctrine of contributory negligence. In the same way, when the question is fairly presented, it can exclude the doctrine of fellow servant as well from the admiralty jurisprudence and by so doing clear the air. Now, however, by its *dictum* in the *Osceola* case,

¹ See the *Osceola*, 189 U. S. 158, 175.

² In actions *in rem* the recovery is on a different principle from *respondet superior*. See *Sherlock v. Alling*, 93 U. S. 99-108.

³ *The City of Alexandria*, 17 Fed. Rep. 390.

⁴ 3 Sawyer 562, 11 Fed. Cas. 310.

that the liability of the ship for an injury to one seaman by the negligence of another does not exist *because they are fellow servants*, it implies that unless the servants are fellow servants in the technical sense of the common law a liability on the part of the employer does or may exist. Accordingly, we shall probably see many such cases of servant against employer or ship, and shall have to determine in each case, as at common law, whether the servants are in a common employment or not; for instance, whether a stevedore, longshoreman, cattleman, seaman, etc., are in a common employment, whether the foreman, stevedore, boat-swains, mates, master, etc., are vice-principals, and the whole doctrine is fairly launched into the admiralty law.

It is all the more unfortunate at this late day, because the doctrine of fellow servant, first enunciated in England in 1837 in the case of *Priestley v. Fowler*,¹ has hardly been approved, and the legislatures both in England and this country by their employer's liability acts have been gradually paring it down and changing it. It arose in the first place as one of the attempts by the common law courts to mitigate the harshness and injustice of *respondeat superior*: in admiralty, *respondeat superior* has not been applied *in personam* with the same harshness in this particular, and there is no need of such mitigation. It is to be hoped that as this part of the decision of the Supreme Court in the *Osceola* case, though contained in a solemnly declared and carefully drawn article, is really only a *dictum*, it may be revised and overruled when the subject is brought to its attention again.

Frederic Cunningham.

¹ 3 M. & W. 1.

ALL CASES IN ADMIRALTY IN WHICH THE FELLOW SERVANT DOCTRINE HAS
BEEN INVOKED BY THE FEDERAL COURTS SINCE HALVERSON *v.* NISEN.

- The Chandos, 4 Fed. Rep. 645 (1880), Dist. of Oregon.
- The Clatsop Chief, 8 Fed. Rep. 163 (1881), Dist. of Oregon.
- The Victoria, 13 Fed. Rep. 43 (1882), Circ. Ct. Dist. of Mass.
- The City of Alexandria, 17 Fed. Rep. 390 (1883), So. Dist. N. Y.
- The E. B. Ward, Jr., 20 Fed. Rep. 702 (1884), E. Dist. Louisiana.
- The Harold, 21 Fed. Rep. 428 (1884), So. Dist. N. Y.
- The Titan, 23 Fed. Rep. 413 (1885), Circ. Ct. So. Dist. N. Y.
- The Islands, 28 Fed. Rep. 478 (1886), Dist. of New Jersey.
- The Furnessia, 30 Fed. Rep. 878 (1887), E. Dist. N. Y.
- The Phoenix, 34 Fed. Rep. 760 (1888), Dist. of So. Carolina.
- The Egyptian Monarch, 36 Fed. Rep. 773 (1888), Dist. of N. J.
- The Wells City, 38 Fed. Rep. 47 (1889), E. Dist. N. Y.

- The Queen, 40 Fed. Rep. 694 (1889), So. Dist. N. Y.
 The Sachem, 42 Fed. Rep. 66 (1890), E. Dist. N. Y.
 The A. Heaton, 43 Fed. Rep. 592 (1890), Circ. Ct. Dist. of Mass.
 The Servia, 44 Fed. Rep. 943 (1891), So. Dist. N. Y.
 The Frank and Willie, 45 Fed. Rep. 494 (1891), So. Dist. N. Y.
 The Walla Walla, 46 Fed. Rep. 198 (1891), No. Dist. Wash.
 Grimsley *v.* Hankins, 46 Fed. Rep. 400 (1891), Dist. of Ala.
 The City of Norwalk, 55 Fed. Rep. 98 (1893), So. Dist. N. Y.
 The Bolivia, 59 Fed. Rep. 626 (1893), So. Dist. N. Y.
 Red River Line *v.* Cheatham, 60 Fed. Rep. 517 (1894), C. C. A. 5th Circ.
 The Transfer No. 4, 61 Fed. Rep. 364 (1894), C. C. A. 2nd Circ.
 The Ravensdale, 63 Fed. Rep. 624 (1894), So. Dist. N. Y.
 The Victoria, 69 Fed. Rep. 160 (1895), E. Dist. N. Y.
 Herman *v.* Mill Co., 71 Fed. Rep. 853 (1896), No. Dist. Cal.
 The Coleridge, 72 Fed. Rep. 676 (1896), So. Dist. N. Y.
 The Louisiana, 74 Fed. Rep. 748 (1896), C. C. A. 5th Circ.
 The Peninsular, 79 Fed. Rep. 972 (1897), E. Dist. N. Y.
 The Job T. Wilson, 84 Fed. Rep. 204 (1897), Dist. of Md.
 McGough *v.* Ropner, 87 Fed. Rep. 534 (1898), E. Dist. Pa.
 The Anaces, 87 Fed. Rep. 565 (1898), E. Dist. N. Car.
 The Miami, 87 Fed. Rep. 757 (1898), E. Dist. N. Y.
 The Antonio Zambrana, 89 Fed. Rep. 60 (1898), E. Dist. N. Y.
 The Kensington, 91 Fed. Rep. 681 (1899), So. Dist. N. Y.
 Carlson *v.* Pilot's Assoc., 93 Fed. Rep. 468 (1899), So. Dist. N. Y.
 Olson *v.* R. R. Co., 96 Fed. Rep. 109 (1899), No. Dist. Cal.
 104 Fed. Rep. 574 (1900), C. C. A. 9th Circ.
 The Picqua, 97 Fed. Rep. 649 (1899), So. Dist. N. Y.
 The Slingsby, 120 Fed. Rep. 748 (1903), C. C. A. 2nd Circ.
 Memphis, etc., Co. *v.* Hill, 122 Fed. Rep. 246 (1903), C. C. A. 8th Circ.
 Sievers *v.* Eyre, 122 Fed. Rep. 734 (1903), So. Dist. N. Y.
 The Gladestry, 128 Fed. Rep. 591 (1904), C. C. A. 2nd Circ.
 The Elton, 131 Fed. Rep. 562 (1904), E. Dist. Pa.

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SPECIFIC PERFORMANCE AT LAW. — A contract of purchase imposes a liability for the price conditional upon the receipt of the chattel; and even though the buyer by refusing to accept makes performance impossible, the vendor cannot recover the price.¹ Courts, to be sure, have held that a tender of performance is equivalent to performance,² but this can be true only for the purpose of grounding an action, not as a basis for computing damages.³ The failure to make this distinction caused the court in *Bement v. Smith*⁴ to allow the vendor to recover the price without delivery of the chattel. The title is regarded as in the vendee the moment the chattel is set aside for him. As this in effect allows specific performance at law, some courts limit it to those cases where the chattel is specially manufactured.⁵ *Kinkead v. Lynch*, 132 Fed. Rep. 692 (Circ. Ct., Dist. of Nev.).

In either case there are three objections to allowing specific performance at law. First, consent, which is necessary for the transfer of title, is not obtained by mere appropriation to the buyer.⁶ In fact the courts would not

¹ See opinion of Holmes, J., in *White v. Solomon*, 164 Mass. 516. The learned justice further adds that since payment was to be made upon delivery but before title passed, the plaintiff could recover the entire amount. (Field, C. J., Morton and Allen, JJ., dissented.) A recent North Carolina case makes the same distinction. *National, etc., Co. v. Hill*, 48 S. E. Rep. 637. The difficulty in such cases is that it is stretching the facts thus to interpret the contract.

² See *Bement v. Smith*, 15 Wend. (N. Y.) 493, and cases cited.

³ See *Shannon v. Comstock*, 21 Wend. (N. Y.) 457, 460.

⁴ *Supra*.

⁵ See to the same effect, *Ballentine v. Robinson*, 46 Pa. St. 177.

⁶ *Salmond*, Jurisprudence 376.

always hold that the title has passed, since a *bona fide* purchaser from the vendor would probably be protected.⁷ This suggests the second objection. Since the vendor could thus cut off the vendee's interest, leaving him only an action at law which insolvency would render worthless, it is unjust to compel payment without more adequately securing his interest in the property. Lastly, it may be urged that the vendee, on default of the vendor, has no similar right to demand delivery of the manufactured article; and surely his right should not be inferior to the seller's. A court of law cannot order the vendor to transfer; nor can the vendee bring replevin.

These difficulties encountered by common law courts because of their procedure are overcome by allowing an action in equity should specific performance in such cases be advisable. This remedy obviates the first difficulty, since equity will force the defendant to take the title. Nor can the second objection be urged, since a court of equity will grant relief by compelling concurrent performance by the seller and the buyer.⁸ Finally, the vendee by coming into equity could force the vendor to transfer the property and thus overcome the last objection.

The first two of these objections apply equally where rescission of an executed contract is allowed for breach of warranty. Moreover, there are objections to allowing this, even in equity. It has been urged that mercantile custom and justice demand such a remedy.⁹ While admittedly goods are often returnable, it is only on the understanding that the vendee will receive goods of the proper kind in their place, for the vendor would hardly be willing that he return the goods absolutely, and thus escape a bad bargain. Under such circumstances there is an actual contract of rescission, which would seem to be the custom of merchants; but the rescission allowed by the Massachusetts courts would not permit the vendor to offer proper goods in exchange.¹⁰ Again, it is urged that it is unjust of the vendor to insist upon his bargain when he has not furnished the proper goods,¹¹ but is it not more inequitable for the vendee to use this breach of warranty to avoid the consequences if the contract is unprofitable? It is not so unjust on the part of the vendor, since he is ready to respond in damages which adequately recompense the vendee.¹²

ADMIRALTY JURISDICTION OF TORTS. — The jurisdiction of the admiralty court in England as set forth in the ancient royal grants was sufficiently broad in scope to comprehend all maritime affairs.¹ But after a struggle against the jealousy of the common law courts, particularly in the sixteenth

⁷ For necessity of change of possession, see Williston, *Cas. Bankruptcy* 169, n. 1.

⁸ See Langdell, *Brief Survey of Equity Jurisdiction* 46-47; 1 *HARV. L. REV.* 361, 362.

⁹ Professor Williston in 16 *HARV. L. REV.* 465-475, where all the authorities are collected. See also articles by Professor Burdick and Professor Williston in 4 *Columbia L. Rev.* 1, 195, 265.

¹⁰ This must follow. Since it has been decided that the buyer cannot also bring an action for damages, it would hardly be just to allow a seller in default an option to offer goods of the proper kind. See Professor Williston's *Draft of Sales Law*, sec. 54 (2). This is not the case where the contract is executory. 16 *HARV. L. REV.* 474, n. 1.

¹¹ 16 *HARV. L. REV.* 474.

¹² 16 *HARV. L. REV.* 475.

¹ Benedict, *Admiralty Prac.*, 3d ed., § 110.

and seventeenth centuries, it was seriously narrowed, so that as to contracts and torts it included only those which were consummated upon the sea.² Later, this rule, based solely on locality, was somewhat relaxed as to contracts.³ In the United States, admiralty jurisdiction has always been considered more comprehensive than was the English jurisdiction at the time of the adoption of our Constitution.⁴ In contracts our courts have disregarded the locality test, and have considered simply whether the transaction is of a maritime nature.⁵ But as to torts they continued until recently to limit their jurisdiction by locality so as to exclude a tort by a vessel to things on land and to include a tort by things on land to a vessel.⁶

A comparatively late case, however, has required that the tort shall also be maritime in nature.⁷ This decision, although directly overruling no previous cases, because, as a matter of fact, in all of them the tort was fairly maritime, was an important limitation in the direction of assimilating the jurisdiction of contracts and of torts. It meant that the locality test had given way to the universal test of the maritime character of the event, except in the one class of cases in torts of injury by a vessel to some person or thing on land. And the Supreme Court of the United States seems now to have abolished this exception by taking jurisdiction of damage by a faulty vessel to a beacon light solidly attached to the bottom of the sea. *United States v. Evans*, 25 Sup. Ct. Rep. 46. Although the majority of the court carefully confine themselves to the exact facts before them, Mr. Justice Brown, concurring, seems justified in his conclusion that the decision cannot logically stop half-way, but really brings the United States into line with the present statutory jurisdiction in England in including "any claim for damage done by a ship."⁸ If that is true, then the locality test is finally abandoned and the maritime character of the transaction is made the sole test. This result is commendable. As a matter of first principles it seems equally logical for admiralty to exclude the non-maritime and to include the maritime. It may be objected that these two recent cases establish an indefinite test that will increase the perplexity and uncertainty of the jurisdiction. But no serious difficulty has been remarked in determining what contracts are maritime, and torts would seem equally amenable. Furthermore, there appears to be as much reason in sense and justice for this change as existed in the case of contracts. Just as admiralty should include a contract of marine insurance made on land and should exclude a mortgage of realty made at sea, so it should include damage to a pier by the faulty navigation of a ship and should exclude slander by one passenger of another.⁹

LIABILITY OF BANK TO DEPOSITOR AFTER COLLECTION OF DRAFT BY CORRESPONDENT. — When a draft deposited for collection at a distance is forwarded by the depositary bank to its correspondent, and the latter, after collecting, fails to account, the depositary bank is by the majority of

² See *De Lovio v. Boit*, 2 Gall. (U. S. C. C.) 398, 403 ff.

³ See *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 24.

⁴ See *De Lovio v. Boit*, 2 Gall. (U. S. C. C.) 398, 472.

⁵ *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1.

⁶ *The Plymouth*, 3 Wall. (U. S.) 20; *Hermann v. Port Blakely Mill Co.*, 69 Fed. Rep. 646.

⁷ *Campbell v. Hackfeld & Co.*, 125 Fed. Rep. 696 (1903).

⁸ Admiralty Court Act of 1861, 24 Vict. c. 10, § 7; *The Swift*, [1901] P. 168.

⁹ *Benedict, Admiralty Prac.*, 3d ed., § 308.

courts held liable on the theory that it is an independent contractor, and responsible as such for default of its agents.¹ Many courts deny liability on the ground that the depositor authorizes the appointment of the collecting bank as his sub-agent, and can therefore hold the depositary bank only for negligence in making the selection.² *Holder v. Western German Bank*, 132 Fed. Rep. 187 (Cir. Ct., S. D. Oh.). And in the majority of cases where the laches of the correspondent rather than its default after collection has been in issue, the courts seem to accept this reasoning.³

Both views seem to misconceive the relation between the parties, which is in fact one of trust rather than of agency. Upon indorsement by the depositor, the legal title to the draft passes to the depositary bank, which becomes trustee for the depositor. When the bank indorses to its correspondent, the latter takes legal title to the draft in trust for the former, which in turn holds its equitable claim as trustee for the depositor.⁴ Since the trustee is not responsible for diminution in value of the *res*, it would follow that the failure of a sub-agent bank after collection casts no liability on a depositary bank.

It has been suggested that the holding of the majority of the courts on this point may be justified by regarding the position of the depositary bank as analogous to that of a *del credere* factor.⁵ The advantage gained from the use of the money, which is usually not withdrawn at once after collection, is said to be equivalent to the extra commission of the *del credere* factor as consideration for the guarantee. If there were such additional consideration, while it would be useful as evidence, the necessity would still exist of showing that it was directed to this implied guarantee. Further, the theory seems untenable from the fact that when suit is brought in an individual case, neither has the depositary bank received any of the money, nor has the depositor suffered the legal detriment of promising to leave the money on deposit for any time after its receipt by the bank.

There is, however, ample consideration for the contract of collection,⁶ and this without more will support any obligations which may be annexed. In the absence of an express guarantee by the depositary bank of the sum collected by its correspondent, the real question seems to be whether the law will impose such a burden. The answer must depend on what in the general course of business would be fair to both parties. The use of the collections before withdrawal by depositors seems in the long run of sufficient value to compensate for the occasional losses which would be caused, under the rule proposed, by failure of correspondents to account. For this reason it would appear neither unreasonable nor unjust to hold that the depositary bank must be taken to guarantee the proceeds of drafts collected by its correspondent.⁷

¹ *Mackersy v. Ramsays*, 9 Cl. & Fin. 818; *Kent v. Dawson Bank*, 13 Blatchf. 237; *St. Nicolas Bank v. State Bank*, 128 N. Y. 26; *Bradstreet v. Everson*, 72 Pa. St. 124.

² *Daly v. Butchers', etc., Bank*, 56 Mo. 94.

³ *Bank of Louisville v. First, etc., Bank*, 8 Bax. (Tenn.) 101; *Guelich v. National Bank, etc.*, 56 Ia. 434. See 46 Cent. L. J. 127.

⁴ *Commercial Bank, etc. v. Armstrong*, 148 U. S. 50. *Contra*, in accord with principal case, *Anheuser-Busch, etc., Association v. Morris*, 36 Neb. 31.

⁵ *Cf. Bank of Utica v. McKinster*, 11 Wend. (N. Y.) 473; *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215, 224, 225. That this is not sufficient to raise a liability for the negligence of the correspondent is argued in 1 *Morse, Banks and Banking* § 275. The distinction between this guarantee and a general liability for laches is noted in *Simpson v. Waldbury*, 63 Mich. 439, 449.

⁶ See *Smedes v. Utica Bank*, 20 Johns. (N. Y.) 372.

⁷ *Cf. 1 Morse, Banks and Banking* § 276.

CONFUSION OF THE DOCTRINE OF EQUITABLE ELECTION WITH ESTOPPEL BY DEED. — When a testator leaves property by will to A and purports to leave to B property belonging to A, equity considers it unconscionable for A to take the benefit under the will and, at the same time, to defeat the testator's intention as to B by retaining his own property. It therefore compels him to elect to surrender either his own property or his rights under the will.¹ A similar principle had been applied to wills in the civil law.² The English equity courts first applied it to wills,³ and later extended it to deeds.⁴ It had, however, no relation to the doctrine of estoppel by deed, which was much older and rested on distinct principles.

Estoppel, whether by record, by deed, or *in pais*, was originally a principle of the law of evidence. As the court would not allow proof of a fact contrary to a judgment of record on the same issue between the same parties, so it excluded all ordinary testimony that a statement under seal was contrary to fact,⁵ or that one who performed a solemn act *in pais*, such as livery of seisin,⁶ was without authority to do so. When, however, a jury found by special verdict that the facts were inconsistent with the statements in the deed or the solemn act *in pais*, the court passed on the facts as the jury found,⁷ for the declaration of the jury was evidence of a higher nature. In other words, estoppel established no substantive rights, but merely excluded evidence of a lower character in rebuttal. And modern cases which have held that substantive rights have been acquired by estoppel, may usually be supported on some other ground.

When courts, therefore, following earlier *dicta*,⁸ have decided cases by adopting as a rule of substantive law that he who takes under an instrument, whether deed or will, is estopped to deny the truth of any statement in the instrument, they have confused a mistaken conception of estoppel by deed with the doctrine of equitable election; and unjust results have naturally followed. Thus, when a testator bequeathed to A only that to which she was by law entitled and to B property belonging to A, the Supreme Court of North Carolina recently held that A, by proving the will and acting thereon, had elected to take under it, and was bound by the other provisions of the will to give her property to B. *Trip v. Nobles*, 48 S. E. Rep. 675. Obviously the doctrine of estoppel by deed should not apply, and there is no reason for equity to take away A's property and give it to B; for A received no substantial benefit to charge her conscience, nor, on the other hand, could B have received anything, had A elected against the will.

NATURE OF THE RIGHTS OF AN ESTOPPEL-ASSERTER. — Although there are suggestions in different cases that estoppel is purely personal in its nature and consequently operates only in favor of the person originally mis-

¹ *Streatfield v. Streatfield*, Cas. t. Talb. 176.

² Inst. lib. 2, tit. 20, s. 4; tit. 24, s. 1.

³ *Locy v. Anderson*, Ch. Cas., ed. 1870, 155; *Noys v. Mordaunt*, 2 Vern. 581.

⁴ *Bigland v. Huddleston*, 3 Bro. C. C. 285 n.

⁵ Lit. 58; 34 H. VI, 48.

⁶ Co. Lit. 352 a.

⁷ *Sutton v. Dicons*, Sav. 98; *Goddard's Case*, 2 Co. 4 b.

⁸ *Doe d. Devonshire v. Cavendish*, 4 T. R. 743 n., *per* Lord Mansfield; *Wilson v. Townshend*, 2 Ves. Jun. 696, *per* Lord Loughborough. Cf. also *Goodtitle v. Bailey*, Cowp. 601.

led,¹ it is clear on authority that an innocent purchaser from such person is protected.² It may be argued, however, that a purchaser with notice is entitled to no such protection, inasmuch as he is not deceived. If this view were adopted, the result would be that one who acquired a right by estoppel would be unable to realize upon it in case the facts became known to the world. Thus if he should obtain by estoppel land or a chattel, he would be forced to retain it for his own use forever; and upon his death, since no one taking with notice could set up the estoppel, it would revert to the former owner. Or if the property so acquired were a note not yet due, he could not negotiate it, and if it did not fall due within his lifetime, there could be no recovery. If, however, it is objected that these rights would pass to the heir and the executor respectively on the theory that they continue the legal existence of the deceased, the estoppel would then violate the policy of the law against restraints on alienation by creating a right descendible but not transferable.

The suggestion approved in a recent case decided by a federal circuit court in Iowa, that the transferee with notice of negotiable paper, which is valid only by estoppel, be allowed to recover merely the amount he paid for it, does not obviate the difficulties, as it would afford little practical relief to the original estoppel-asserter. *Gamble v. Rural Independent School District*, 132 Fed. Rep. 514. His interests can be adequately protected only by holding that a subsequent purchaser who takes with knowledge of the facts, is fully protected.³ This view, likewise, would recognize estoppel in its true light as creating a right equitable in its nature and freely transferable like other property interests. As it would be destructible like other equitable rights, a *bona fide* purchaser from the one estopped would take free from the equity.⁴ This would not be true, of course, of estoppel by deed where, as in many states, that is a distinct doctrine giving rise to legal rights and confined in its application strictly to transfers of land.⁵ But regarding estoppel *in pais* in this light, the question of knowledge or the amount of consideration paid by the assignees of this equitable right would become irrelevant.

LIABILITY FOR INTERFERENCE WITH UNLAWFUL OBSTRUCTION IN HIGHWAY.—It is well established that a person who is inconvenienced by an obstruction in a public highway may remove it.¹ In so doing, however, he must not commit a breach of the peace,² and must do no more damage to the obstacle than is reasonably necessary.³ To those using the highway there is a further duty not to create a more serious obstruction. For example, a street railway company, which has the right to remove snow from its tracks, must not pile it up in such a way as to interfere unnecessarily with the use of the street.⁴

In view of these decisions, what should be the duty imposed upon one

¹ See *Shillito Co. v. McClung*, 51 Fed. Rep. 868.

² *Kinnear v. Mackey*, 85 Ill. 96.

³ *Anderson v. McPike*, 86 Mo. 293.

⁴ *Rutz v. Kehn*, 143 Ill. 558.

⁵ *Knight v. Thayer*, 125 Mass. 25.

¹ *Inhabitants of Arundel v. M'Culloch*, 10 Mass. 70.

² *State v. White*, 18 R. I. 473.

³ *Mark v. Hudson, etc., Co.*, 103 N. Y. 28.

⁴ *Bowen v. Detroit City Ry. Co.*, 54 Mich. 496.

who changes the position of an obstruction without removing it from the highway? To hold that he must under all circumstances remove it to a place where it would no longer be dangerous, might often result in casting upon an innocent party responsibility for a danger created solely by another. It is conceived, however, that in no case should he be allowed to increase an existing danger or to create a new one. The fact that he has been inconvenienced can furnish no justification for his deliberately endangering others.⁵ Thus he would be liable if he should move the obstruction to a place where the travel is heavier, or where a different class of persons would be affected. Likewise, if he should move it a considerable distance, although without increasing the danger or imperiling a different class of persons, he would be liable, for the situation would be so materially altered that he could fairly be said to have created a new danger. Moreover, it is believed that he would be responsible if he should replace the obstruction in its original position; for, having once removed the danger from that place, he would be creating it there anew. In other words, while exercising his lawful right of removal, he should be considered under a duty to do no act which an ordinarily prudent man under the same or similar circumstances would foresee as likely to increase an existing danger or to create a new one. Whether in any case he has violated this duty would seem to be a question of fact. The Supreme Court of Rhode Island, however, has recently ruled as matter of law that a street railway company which removed an obstruction from its track was not liable to a person who, while in the exercise of due care, subsequently came in contact with it. *Howard v. Union Ry. Co.*, 57 Atl. Rep. 867 (R. I.).

JURISDICTION OVER CRIMES COMMITTED ON A VESSEL OF ONE COUNTRY FROM THAT OF ANOTHER. — Discussing the recent killing of English fishermen from a Russian vessel in Doggerbank, an editorial in the *Justice of the Peace* concludes that English courts, following *Reg. v. Keyn*,¹ would not take jurisdiction. *The North Sea Outrage*, 68 Just. P. 529 (Nov. 5, 1904). Since the *locus* of a crime determines its jurisdiction, the primary question is really this: was the homicide committed on the British sloop or on the Russian vessel?

Homicide is the unlawful application of force to the body resulting in death, and the doctrine is general that the crime is committed where the force operates. This constituted the breach of the king's peace, which first gave the king's courts jurisdiction.² In the large class of cases, in this country, which involve shooting from one state into another, the overwhelming authority is that the latter controls the venue.³ This precise question arose in *Reg. v. Coombes*,⁴ where the master of the king's sloop was fired on from the shore, and it was held that, since the offense took place where the bullet struck, the defendant was properly tried by the Admiralty. And where a shot from an American vessel killed a native on board a vessel lying in the Society Islands, our court, deeming the act to have been com-

⁵ Cf. *Scott v. Shepherd*, 2 Black, W. 892; see also Clerk & Lindsell Torts, 2d ed. 130.

¹ L. R. 2 Ex. Div. 63, 13 Cox C. C. 403.

² 2 Poll. & Mait., Hist. Eng. Law, 2d ed., 463.

³ *State v. Hall*, 114 N. C. 909.

⁴ 1 Leach 432.

mitted on the foreign ship, disclaimed jurisdiction.⁵ But in *Reg. v. Keyn*⁶ the majority of the court refused to hold a German captain through whose negligent navigation one on board an English vessel was killed. The court distinguished between murder and manslaughter, holding that, since in the latter no intention accompanies the force, the crime occurs at the place of negligence. But just as the intention continues with the force to make the blow murder, so the negligence persists to constitute manslaughter. What is punished is not the negligence but the resulting homicide, and in both cases that takes place where the force strikes the body.

Every vessel while on the high seas is subject to the exclusive jurisdiction of the nation whose flag she flies.⁷ A foreigner on a British ship is punishable under English law;⁸ and, in this country, a murder committed by a foreigner on an American vessel, even within Canadian waters, gives the United States jurisdiction.⁹ Therefore, when the *locus* of a crime is shown to be an English vessel, the jurisdiction of the English courts would seem to be complete. The fact that the culprits were acting from a public vessel rather than a private one is immaterial, for the crews of both must respect the municipal law prevailing in a foreign jurisdiction.¹⁰ If the culprits, then, are found in English territory, there ought to be no difficulty. Extradition, however, would hardly be granted, even if it should be demanded, and redress would, probably, have to be sought through diplomatic channels. The extradition treaty between England and Russia does not cover such a contingency.¹¹ England has acceded to extradition demands for one of its citizens charged with practicing false pretenses on German merchants, though never present in Germany;¹² but the decision has been criticised, and would, probably, not be followed.¹³ To constitute one a fugitive criminal, presence in the demanding state and subsequent flight are deemed necessary.¹⁴

RIGHT OF RECOUPMENT FOR IMPROVEMENTS TO CONVERTED PROPERTY. — The usual rule in trover permits the owner to treat any moment at which wrongful dominion is being exercised over his property as the moment of conversion, and to recover in damages its full value at that time. Where, however, one acting under a *bona fide* mistake has improved the converted property by the expenditure of labor and materials, the decisions clearly trend toward making the value at the time of the original taking the basis of recovery.¹ This relaxation of the general principle, which seems to make the rule of damages in trover depend upon the moral attitude of the converter, is explained in a case lately decided by a federal circuit court in New

⁵ *United States v. Davis*, 2 Sumn. (U. S. C. C.) 482.

⁶ *Supra*.

⁷ *Crapo v. Kelly*, 16 Wall. (U. S.) 610; *Reg. v. Anderson*, L. R. 1 C. C. 161.

⁸ *Rex v. Sattler*, 7 Cox, C. C. 431.

⁹ *United States v. Rodgers*, 150 U. S. 249; recognizing the prevailing doctrine of concurrent jurisdiction of the local country, and that of the ship's flag in such a case. See *Reg. v. Anderson*, *supra*.

¹⁰ See Hall, Int. Law, 5th ed., 195.

¹¹ See Clarke, Extradition, 4th ed., ccclxvii.

¹² *Reg. v. Nillins*, 53 L. J. M. C. 157.

¹³ Clarke, *supra*, 262.

¹⁴ *State v. Hall*, 115 N. C. 811; *Jones, etc. v. Leonard*, 50 Ia. 106; *In re, Mohr*, 73 Ala. 503.

¹ *Winchester v. Craig*, 33 Mich. 205; *Forsyth v. Wells*, 41 Pa. St. 291.

Hampshire. *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92. It is there suggested that though the damages are *prima facie* to be determined by the usual rule, yet the *bona fide* converter has by his labor acquired a property right in the article which entitles him to recoup. Whether the expense to which he has been put or the increase in value which he has created, is the measure of this right is in dispute. The basis of the recoupment is quasi-contractual. The fundamental requisite in quasi-contract, the unjust enrichment of the party against whom the claim is made, undoubtedly exists here. An express request that the service be rendered is not required; and the argument that one should not be permitted to thrust himself upon another as his creditor is met by the circumstance that in cases of this kind the converter has simply used the property for the purposes for which it was naturally intended. Where this is not true, or where the owner has special reasons for wanting his property preserved in its original condition, the quasi-contractual grounds fail, and the general rule should be applied.²

The *mala fide* trespasser is usually denied the right of recoupment because in order to establish it he would have to show his own wrong.³ A *bona fide* purchaser from a *bona fide* trespasser may assert the right.⁴ The rights of an innocent purchaser from a *mala fide* trespasser are, however, most difficult of adjustment. Under the strict rules of the common law it is impossible to grant him any relief.⁵ The suggestion that he receives from his vendor a right which the latter could not enforce, seems to involve the establishment of an exception to the general rule that the assignee can acquire nothing from his assignor which the latter did not possess. But, clearly, upon broad principles of justice he is entitled to the value of the trespasser's labor. Though he has not himself done the work upon the property converted, he has paid for that work, and it is he who bears the expense of the unjust enrichment of the original owner. In other cases where the legal remedy in quasi-contract is unavailable, equity gives relief. For example, in the analogous case of improvements made upon land under a *bona fide* mistake as to title, a bill in equity to recover the value of the improvements has been sustained.⁶ If the right to such relief could be established for the innocent purchaser in equity, he might, upon the analogy of equitable defenses at law, be permitted to avail himself thereof by way of recoupment in an action at law.⁷

RESTRICTION OF THE POWER OF ASSIGNMENT. — Whether the maker of a note can restrict its assignment in the hands of the payee by inserting words of non-assignability, seems never to have been squarely decided. A recent *dictum* by the Court of Appeals of Missouri, however, holds that such expressions are ineffectual except to make the note non-negotiable. *Herrick v. Edwards*, 81 S. W. Rep. 466. The court relies on the analogy of the rule against restraints on the alienation of land and chattels; but plainly there is a distinction between the absolute transfer of a chattel and

² See *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332.

³ *Ellis v. Wire*, 33 Ind. 127; but see *Single v. Schneider*, 30 Wis. 570.

⁴ *White v. Tawkey*, 108 Ala. 270.

⁵ *Wooden-Ware Co. v. United States*, 106 U. S. 432.

⁶ *Bright v. Boyd*, 1 Story (U. S. C. C.) 478; Keener, *Quasi-Contracts* 379.

⁷ Cf. *Railroad Co. v. Hutchins*, 32 Oh. St. 571, 37 Oh. St. 282.

the creation of a chose in action, for in the one case the transferor loses at once all interest in the *res*, while in the other the obligor remains vitally interested, since he must meet the obligation. Upon this peculiar feature of choses in action, the common law idea that they could not be assigned probably rested. A promise to pay A was a promise to pay A only, and could not be made into a promise to pay B except with the consent of the promisor. To assign an obligation was to change it, and the early lawyers were unable to see how the promisor could be held liable on such an altered contract. Difficult as it was to escape the logic of this argument, mercantile convenience soon demanded transferability of certain kinds of obligations. Since the obligor's right to do only what he promised was the main objection to assignment, the old conception naturally gave way most rapidly in the case of promises to pay money, for the transfer of such an obligation could make little or no difference to the promisor.¹ Assignment even here was effected by giving to the assignee a power of attorney to collect the note in the name of the promisee. Although the assignee finally acquired the right to collect in his own name, it is suggestive of the true nature of assignment that his rights have still to be worked out through the assignor, so that, although a purchaser for value and without notice, he takes subject to all equities in favor of the maker.² So jealous of the latter's rights has been the law that even when perfect negotiability of notes was obtained by statute, it was confined to those on which the maker by words of negotiability had shown an express intention to make his promise general.³ The growth of the assignability of contracts, other than promises to pay money, further illustrates the theory that the principal factor in determining whether a contract is assignable is whether it could make any difference to the promisor to perform to any other than the original promisee. Thus, while ordinarily the consent of the contractor to assignment is virtually presumed, if the contract involves reliance on the personal services of the promisee it clearly cannot be assigned.⁴ It would seem, therefore, on principle, that a note should not be regarded as assignable contrary to an express declaration of the maker, unless mercantile convenience demands that a promise to pay money to "A only" shall be considered a promise to pay the whole world.⁵

BILLS OF LADING AS SECURITY FOR ADVANCES. — The possession of a bill of lading has from early times been universally held to determine the possession of the goods themselves.¹ In a similar manner the position of one who takes a bill of lading in his own name as security for advances depends upon the extent to which the form of the bill should operate to determine the title to the goods. Upon this point there is by no means the same agreement. The view taken by the courts² is that a bill of lading does or does not pass legal title according to the intention of the parties, its form being merely evidence of such intention. The view of merchants, on the other hand, considers the form of the bill as conclusive evidence of legal title. In de-

¹ 3 HARV. L. REV. 340.

² *Edge v. Bumford*, 31 Beav. 247.

³ 3 & 4 Anne, cap. ix. §§ 1-3.

⁴ *Swarts v. Narragansett Electric Lighting Co.*, 59 Atl. Rep. 77 (R. I.).

⁵ See *Edie & Laird v. East India Co.*, 1 Black. W. 295, 298.

¹ *Evans v. Marlett*, 1 Ld. Raym. 271.

² *The Carlos F. Roses*, 177 U. S. 655; *Moakes v. Nicolson*, 19 C. B. (N. S.) 290.

termining whether the intention of the parties or the understanding of merchants ought to be the test, it is to be noted that under the former, serious difficulties are encountered in defining the position of one to whom a bill of lading runs but who according to the intention of the parties has no title to the goods, since an innocent purchaser from him is held to get a good title.³ This result indicates a partial recognition by the courts of the right to rely upon the form of the bill in accordance with mercantile usage. The importance of bills of lading in modern business transactions renders it highly desirable that the view of the courts should be extended to conform entirely with the understanding of merchants, as has been done in the case of bills of exchange. If then the intention of the parties is adopted as the test, one taking a bill of lading in his own name as security for advances would be either a pledgee or a mortgagee according to that intention.⁴ If, however, the more desirable test of mercantile usage is adopted, he would in effect always be a mortgagee having a security title to the extent of his advances, while the consignee would retain an equitable property right in the goods.⁵

Whatever may be the relative merits of the foregoing views, it is submitted that either is preferable to a third view adopted in a recent Massachusetts case in which the holder of a bill of lading taken as security for advances is considered absolute owner of the goods. *Moors v. Drury*, 71 N. E. Rep. 810. Although the plaintiff in that case was perhaps neither pledgee nor mortgagee within the purview of the particular statute involved, nevertheless the court's position in treating him as absolute owner finds no support either on the ground of intention of the parties or on that of mercantile usage. It is obviously unjust that the real purchaser of the goods, who has the duty of insuring, and upon whom the risk of loss and the right of profit fall, should be denied any property right whatever and be given instead a mere contract right. Nor does this point seem to be settled by authority,⁶ as the court is inclined to believe. Four cases are cited in which holders of bills of lading are regarded as owners of the property; but in none of them was the court called upon to decide whether this was an absolute ownership or ownership in the sense of a security title. The language in one case⁷ is, indeed, broad enough to support the idea of ownership in the former sense, but in a second case⁸ that question is expressly undetermined, while in each of the other two⁹ the language of the court even seems to indicate the use of the term "ownership" in the latter sense.

³ *Commercial Bank v. Armsby Co.*, 120 Ga. 74.

⁴ *Cf. Sewell v. Burdick*, 10 App. Cas. 74.

⁵ *Cf. Drexel v. Pease*, 133 N. Y. 129, 136.

⁶ *Drexel v. Pease*, *supra*.

⁷ *New Haven Wire Co. Cases*, 57 Conn. 352, 383.

⁸ *Moors v. Wyman*, 146 Mass. 60, 62.

⁹ *Moors v. Kidder*, 106 N. Y. 32, 44; *Mershon v. Moors*, 76 Wis. 502, 514.

RECENT CASES.

ADMIRALTY—TORTS—TEST OF JURISDICTION.—*Held*, that admiralty has jurisdiction of damage by a faulty vessel to a beacon light solidly attached to the bottom of the sea. *United States v. Evans*, 25 Sup. Ct. Rep. 46. See *Notes*, p. 299.

AGENCY—RIGHTS OF AGENT AGAINST PRINCIPAL—BROKER'S RIGHT TO COMMISSIONS.—The defendant agreed to pay the plaintiff a commission for effecting a sale or exchange of his property. The latter secured a purchaser who entered into a contract with the defendant for an exchange of land. In a suit for his commission, the plaintiff did not prove that the purchaser had title to the land to be exchanged nor that he was financially responsible. *Held*, that a judgment for the plaintiff should be reversed. *Snyder v. Fidler*, 101 N. W. Rep. 130 (Ia.).

It is clear that, before a contract has been consummated between the purchaser and the principal, the broker is not entitled to his commissions unless he has procured a purchaser who is willing and able to perform. *Sayre v. Wilson*, 86 Ala. 151. But if the principal has entered into a contract with the purchaser, some courts have held that the inability of the latter to perform is immaterial. *Roche v. Smith*, 176 Mass. 595; *contra*, *Jenkins v. Hollingsworth & Tabor*, 83 Ill. App. 139. In favor of this view, it is argued that by entering into a contract with the purchaser, the principal has relieved the broker of further duty. But by a fair construction of the agreement, the principal intends to pay only when a purchaser who is able to perform his promise is procured; and as the broker has not performed this condition precedent, it would seem that he is not entitled to recover. Furthermore, since the principal does not know of the purchaser's inability to perform, he can hardly be said to have waived his right to insist upon this requisite before paying the commission. See *Wiley v. Athol*, 150 Mass. 426, 435.

AGENCY—RIGHTS OF PRINCIPAL AGAINST AGENT—PRINCIPAL'S RIGHT TO AGENT'S ILLEGAL PROFITS.—An agent, having obtained a loan for his principal on certain debentures, was promised a commission by the creditor company, on the premiums which should become payable to it. *Held*, that the agent cannot be charged as trustee of money so received, though he does become liable for it in account. *Powell & Thomas v. Evan Jones & Co.*, 21 T. L. R. 55 (Eng., C. A.).

This decision follows the well settled law of England. *Lister & Co. v. Stubbs*, L. R. 45 Ch. D. 1. The general rule of law not only forbids an agent, as such, to make any personal gain at the expense of his employer, but to make any collateral gain at all, lest he be tempted, in doubtful cases, to subordinate his principal's interests to his own. The case under discussion is hard to reconcile with this principle; for the temptation to take illegal commissions will not be removed, even by the certainty that the original sum must be disgorged, provided the agent may retain the profits of speculation. But the position of the court seems to be sustained by authority; for America remains silent on the point, while England has repeatedly refused to hold the agent as trustee save when he misuses funds actually coming from the principal. See *Taylor v. Plumer*, 3 M. & S. 562.

BANKRUPTCY—PROVABLE CLAIMS—TORT CLAIM ARISING FROM FRAUD.—The defendants converted stock which they had purchased for the plaintiff. The latter sued for fraudulent conversion, and the defendants pleaded that the plaintiff's claim was provable and barred by their discharge in bankruptcy. § 63 a (4) of the Bankruptcy Act provides that debts founded upon a contract express or implied are provable, and § 17 excepts from the operation of a discharge judgments in actions for fraud, and debts created by the fraud of a fiduciary. *Held*, that under these two sections the plaintiff's claim is provable and discharged, although he elects to sue in tort instead of in contract. *Crawford v. Burke*, 25 Sup. Ct. Rep. 9.

Under former bankruptcy acts, the provability of claims suable either in tort or contract, was determined by the holder's election to sue in contract, as tort claims were not provable. *Williamson v. Dickens*, 5 Ired. (N. C.) 259. Under the present act the Supreme Court takes the view that claims for fraud, except those reduced to judgment or against a fiduciary, must be provable by implication, else these exceptions are meaningless. But a sufficient reason why judgments on claims for fraud had to be

expressly excluded to prevent their discharge is that, in general, judgments for torts are provable. COLLIER, BANKRUPTCY, 4th ed., 442. And claims against a fraudulent fiduciary are evidently excepted so that even where the action is brought in contract, it will not be discharged. *Frey v. Torrey*, 70 N. Y. App. Div. 166. Because certain debts are explicitly excluded, it does not follow that they would otherwise be discharged, or that other claims not mentioned are so affected, as certain claims may be mentioned merely to remove all doubt. Thus the Amendment of 1903 expressly excludes claims for alimony, although these were previously neither provable nor discharged. 32 Stat. at L. 797, § 5; *Audubon v. Shufeldt*, 181 U. S. 575. Therefore § 17 would seem to raise no implication that tort claims for fraud are provable.

BANKS AND BANKING — BANKERS' LIEN — REQUIREMENT OF NOTICE. — A bank applied funds deposited with it in extinguishment of a debt owed it by the depositor, and, without having notified him of that application, refused to pay a check drawn by him in favor of a third party. *Held*, that the bank is liable to the depositor for the resulting damages. *Callahan v. Bank of Anderson*, 48 S. E. Rep. 293 (S. C.).

According to the great weight of authority, a bank to which one of its depositors is indebted may apply upon the debt funds deposited by him. *Bank v. Brewing Co.*, 50 Oh. St. 151. No other case has been found, however, in which this right has been held to depend upon the receipt by the depositor of notice of the bank's intention to exercise it. It would seem that in the principal case the court has disregarded entirely the considerations that have weighed with other courts in deciding similar cases. The right of a bank to pay itself out of deposits made by its debtor is ordinarily rested upon the so-called bankers' lien. *Hayden v. Alton National Bank*, 29 Ill. App. 458. By what is perhaps the more logical theory, it is based upon the right of the bank to offset its claim against that of the depositor. *Clark v. Northampton National Bank*, 160 Mass. 26. In the adoption of either view there seems to be no occasion for the application of any doctrine of required notice.

BANKS AND BANKING — COLLECTIONS — LIABILITY OF DEPOSITARY BANK. — The plaintiff deposited with the defendant bank a draft for collection. The defendant bank forwarded it to its correspondent, directing the latter to remit the proceeds by New York exchange. After collection but before remittance, the correspondent bank failed. *Held*, that the plaintiff may not recover. *Holder v. Western, etc., Bank*, 132 Fed. Rep. 187 (Circ. Ct., S. D. Oh.). See NOTES, p. 300.

BILLS AND NOTES — NEGOTIABILITY — POWER TO RESTRICT ASSIGNMENT. — *Semble*, that where the maker of a note writes the words "non-negotiable" and "non-transferable" on its face, its assignability is not affected, though it is rendered non-negotiable. *Herrick v. Edwards*, 81 S. W. Rep. 466 (Mo., Ct. App.). See NOTES, p. 306.

BILLS OF LADING — HOLDER AS OWNER OF GOODS — *Held*, that one who takes a bill of lading in his own name as security for advances is not a mortgagee or pledgee within Mass. Pub. St. 1882, c. 157, § 28. *Semble*, that he is absolute owner of the goods. *Moors v. Drury*, 71 N. E. Rep. 810 (Mass.). See NOTES, p. 307.

CHARITIES AND TRUSTS FOR CHARITABLE USES — CREATION AND ENFORCEMENT OF CHARITABLE TRUSTS — CONTROL OF PROPERTY ON DIVISION OF CHURCH-MEMBERSHIP. — Through a schism, the Free Church of Scotland was divided into two factions. A great majority of the clergy and congregation rejected the distinguishing principles of their belief, coalesced with another denomination, and were allowed by the trustees to enjoy the entire property of the discordant church. A small minority claimed that the church property should be used only for the promotion of those doctrines which obtained at the time of its acquisition, and brought action for breach of trust. *Held*, that the faction which adheres to the original principles of the church is entitled to the enjoyment of all the property. *General Assembly of the Free Church of Scotland v. Lord Overtoun*, [1904] App. Cas. 515.

The chief difficulty in this class of cases is to determine what really constitutes a departure from the essential beliefs of the church. Property donated to a religious organization is presumed to be for the promulgation of its characteristic doctrines. *Hale v. Everett*, 53 N. H. 9. If this be true, those in control should be restrained from applying it to the promotion of other beliefs. *Attorney-General v. Pearson*, 3 Mer. 353. This is simply an application of the familiar rule that trustees have no right to change the object endowed. *Park v. Chaplin*, 96 Ia. 55. It follows, therefore, that the right to the church property of a divided congregation belongs to that faction which retains those distinguishing doctrines held when the trust was declared. *App v. Lutheran Congregation*, 6 Barr (Pa.) 201. Otherwise a great injustice would be done,

not only to the creator of the trust, but also to those who still adhered to the original ideals and beliefs upon which the sect was founded. On principle, however, it would seem more in accordance with liberal development to allow a church to change its faith without thereby losing its property. And this end would be attained if bequests were construed as given to religious corporations as such, rather than for the furtherance of their peculiar tenets. See 10 HARV. L. REV. 184.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — SEPARATE DOMICILE OF WIFE. — A divorce statute required the plaintiff's residence in the state for six months. A wife, after a *bona fide* residence for that period, sought a divorce. Her husband, domiciled abroad, successfully defended her suit and sought a divorce on a cross-bill. *Held*, that the court has jurisdiction. *Pine v. Pine*, 100 N. W. Rep. 938 (Neb.).

Unless the wife is domiciled in the state, the court has no jurisdiction, for the mere appearance of the parties is insufficient. *Andrews v. Andrews*, 188 U. S. 14. Generally in this country a wife's separate domicile is not restricted to cases of divorce for good cause. *Hopkins v. Hopkins*, 35 N. H. 474. As an original question this seems wrong, since the domicile of the wife depends on her obligation to live with her husband. See *Hunt v. Hunt*, 72 N. Y. 217, 243. On the same principle a domicile allowed by statute when she is still under the obligation should have no extra-territorial validity. *Contra*, *Johnson v. Johnson*, 57 Kan. 343 (*semble*). But just as this reason ceases when the wife has a valid cause for divorce, so when she gives the husband good cause, the obligation to live with him depends on his will; and if he chooses to terminate the obligation by divorce he thereby ceases to control her domicile. *Watkins v. Watkins*, 135 Mass. 83. On that basis the wife was properly held domiciled in Nebraska. As a matter of conflict of laws that gives the court jurisdiction to grant the husband a divorce. *Ibid*. That this was not excluded by the local statute was the main point in the court's opinion, and seems correct. *Cf. Sterl v. Sterl*, 2 Ill. App. 223.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — POSTPONEMENT OF TRIALS. — A statute provided that where a cause was entitled to a preference the court, upon application, "must designate a date during that term on which day the said cause shall then be heard." From an order granting a preference and fixing the trial for a day certain, the defendant appealed. *Held*, that the statute is unconstitutional as tending to deprive a party of life, liberty, or property without due process of law. *Riglander v. Star Co.*, 98 N. Y. App. Div. 101.

This decision is interesting as a novel illustration of the operation of the constitutional guaranty. The Supreme Court has held that the meaning of the phrase "due process of law," which, because of its generality, is difficult to define, must be determined ultimately by a process of inclusion and exclusion of individual cases. *Davidson v. New Orleans*, 96 U. S. 97. Probably the most common statement makes it synonymous with a course of proceedings based upon established rules. See *Pennoy v. Neff*, 95 U. S. 714. It is clear, however, that it at least guarantees the parties to a suit the right of notice and a fair opportunity to be heard. *Stuart v. Palmer*, 74 N. Y. 183. Where the continuance of a case is desirable because of the inability of the plaintiff or the defendant to procure his witnesses or prepare his case adequately, it must seriously interfere with the right to a hearing if the postponement be denied. By a well established general practice courts grant such postponement at their discretion. *Ogden v. Gibbons*, 5 N. J. Law 611. Consequently, a statute arbitrarily prohibiting the exercise of such discretion seems properly held unconstitutional.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — LEGISLATIVE CONTROL OF MUNICIPAL CONTRACTS. — A New York statute provided that each contract made by the state or a municipality with a contractor should contain a stipulation that he should not employ laborers for more than eight hours a day, the contract to be void if he did not fulfil the stipulation. *Held*, that the statute is unconstitutional because it violates the rights and powers of a municipality. *People ex rel. Cossey v. Grout*, 179 N. Y. 417.

For a discussion of the principles involved, see 17 HARV. L. REV. 50.

CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE — PARENT'S DEFAULT A DEFENSE IN ACTION BY CHILD — An action was brought by the father, as administrator of the estate of his two-year-old child, to recover damages for the child's death caused by the defendant's negligence. The father was the sole beneficiary of the child's estate. *Held*, that the contributory negligence of the father is a good defense to the suit. *Davis v. Seaboard, etc., Ry.*, 48 S. E. Rep. 591 (N. C.).

In an action for negligently causing a child's death, the father's contributory negligence is a defense if the suit is brought by him for the loss of his child's services.

Bellefontaine Ry. Co. v. Snyder, 24 Oh. St. 670. In applying the same rule to suits in the child's name, where the father is the sole beneficiary, the court takes the better side of a question upon which there is a conflict of authority. *Bamberger v. Citizens', etc., Co.*, 95 Tenn. 18; *contra*, *Wymore v. Mahaska*, 78 Ia. 396. The result is reached, not by resorting to the fiction of imputed negligence, but by recognizing that the father is the real party interested in the suit, and by treating the case as if he were the plaintiff. As is stated by the court, this proceeding finds its justification in the fact that any other would result in permitting the wrongdoer to derive profit from his own wrong. As a matter of strict principle, the recognition of the real, rather than the ostensible plaintiff can hardly be supported; but the justice of the result seems to warrant the court in disregarding this purely technical objection.

CORPORATIONS — DIRECTORS — DIRECTOR LOANING TO THE CORPORATION. — Two directors of a corporation made a loan of money to it in the name of a third party without disclosing to the other directors that they were the real parties in interest. The third party then assigned the note given by the corporation and the mortgage made to secure it to the two directors, who brought suit to recover the face value of the note without interest and to foreclose the mortgage. *Held*, that the note is valid and the directors may recover. *Schnittger v. Old Home, etc., Co.*, 78 Pac. Rep. 9 (Cal.).

It is well settled that a director may loan money on mortgage security to a corporation, though such a loan will be subjected to a strict scrutiny by the courts to prevent any over-reaching. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587. As a fiduciary the director should, at least, be required to disclose the fact that he is the party making the loan, for the corporation might not care to borrow from its directors. It might be argued, therefore, that for their silence in the present case, these directors should not be allowed to recover on the note, but only in quasi-contract. But according to the weight of authority, a director may purchase a debt due from the corporation, though he may not collect thereon more than the sum paid for it. *Bonney v. Tilley*, 109 Cal. 346. In the present case the practical effect of the transaction was the purchase of a debt due the third party in whose name the loan was made; and since the decision allowing recovery merely of the face value of the note gives the plaintiff no profit upon his unconscionable dealing, it may be supported.

CRIMINAL LAW — INSANITY — BURDEN OF PROOF. — *Held*, that where, in a prosecution for homicide, the defendant's sanity is in issue, the burden is on him to prove insanity by a preponderance of evidence. *State v. Quigley*, 58 Atl. Rep. 905 (R. I.); *State v. Clark*, 76 Pac. Rep. 98 (Wash.).

In a recent Delaware case the jury were instructed that insanity being matter of defense, it must be proved as a fact by the defendant to the satisfaction of the jury; but if, upon the whole evidence, they entertained a reasonable doubt of the defendant's guilt, such doubt should inure to his acquittal. *State v. Jack*, 58 Atl. Rep. 833 (Del., Gen. Sess.).

Two states are thus added to the twenty-two jurisdictions which, with England, treat insanity as an affirmative defense. *State v. Lawrence*, 57 Me. 574. Opposed are the United States Supreme Court and eleven state courts, holding that, the sanity of the accused being an essential element of criminality, the prosecution must establish it beyond a reasonable doubt. *Davis v. United States*, 160 U. S. 469. Delaware, seemingly, takes the latter view. *State v. Reidell*, 9 Houst. (Del.) 470; but see *State v. Danby*, 1 Houst. Cr. Rep. (Del.) 166, 174. The majority view discloses, apparently, a misconception regarding the probative force of the presumption of sanity. THAYER, PRELIM. TREAT. EV. 383. Again, the issue is sometimes confused by statutes requiring the jury, if it acquit because of insanity, so to find by special verdict, apparently compelling the defendant to justify such verdict by proving his insanity. See *State v. Quigley*, *supra*. This would seem to abridge the right to trial by jury guaranteed by state constitutions, in denying the right of a jury to find a general verdict. *Underwood v. People*, 32 Mich. 1. Nor yet does the popular feeling, shared by courts, that guilty persons are likely to escape through easily feigned insanity, warrant the abrogation of the fundamental rule that no accused person shall be punished if there be a reasonable doubt of his guilt. *Cf. State v. Clark*, *supra*.

DAMAGES — EXCESSIVE DAMAGES — REMITTITUR BY APPELLATE COURT. — In an action of tort for personal injuries the only error assigned on appeal was that the verdict was so excessive as to evince passion, prejudice, and caprice. *Held*, that the judgment will be reversed unless the plaintiff remit the amount found by the appellate court to be excess. *Alabama, etc., R. R. Co. v. Roberts*, 82 S. W. Rep. 314 (Tenn.).

This case settles a point heretofore doubtful in Tennessee. *Cf. Vaulx v. Herman*, 8 Lea (Tenn.) 683. It is generally held that, even in cases of tort, the right of an

appellate court to require *remittitur* of excessive damages as a condition to affirming judgment does not encroach upon the constitutional right to trial by jury, and this view would seem to be correct. It is also arguable that such an excess as indicates prejudice or passion on the part of the jury cannot be remitted and the balance affirmed, since the whole verdict is tainted by improper motive. *Stafford v. Pawtucket Hair-Cloth Co.*, 2 Cliff. (U. S. C. C. 1st cir.) 82; *Murray v. Leonard*, 11 S. Dak. 22. But it would seem that if the evidence plainly warrants some recovery, to that extent, at least, the verdict has not been affected by prejudice; and the appellate court may properly fix upon such an amount as, under the same evidence, it would not disturb upon review. *Collins v. Albany, etc., R. R. Co.*, 12 Barb. (N. Y.) 492; *Lombard v. C., R. I. & P. R. R. Co.*, 47 Ia. 494. The practice followed by the principal case also tends to prevent multiplicity of actions and to discourage recoveries based upon defendants' ability to pay, rather than upon plaintiffs' damage.

DAMAGES — MEASURE OF DAMAGES — IMPROVEMENTS TO CONVERTED PROPERTY. — The defendant, acting under a *bona fide* belief that he had acquired title, cut timber on the plaintiff's land, and manufactured the logs into pulp. The plaintiff brought trover. *Held*, that the measure of damages is the stumpage value of the trees at the time they were cut. *Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92 (Circ. Ct., Dist. of N. H.). See NOTES, p. 305.

EASEMENTS — ACQUISITION BY PRESCRIPTION — BEGINNING OF PRESCRIPTIVE PERIOD. — The plaintiff had a way of necessity over the defendant's land, and continued to use it after the necessity ceased. *Held*, that such user did not become adverse until the defendant had notice of the hostile claim. *Ann Arbor, etc., Co. v. Ann Arbor, etc., R. R. Co.*, 99 N. W. Rep. 869 (Mich.).

The contention that user of a way of necessity is always adverse would, if correct, result in a contrary decision, since the right ceases with the necessity. *Cf. Plitt v. Cox*, 43 Pa. St. 486; *Viall v. Carpenter*, 14 Gray (Mass.) 126. The court properly rejected this argument, since the basis of such an easement is an implied grant. *Tracy v. Atherton*, 35 Vt. 52. The decision proceeds on the ground that a licensee's user does not become adverse until the landowner knows of his hostile claim. *Taylor v. Gerrish*, 59 N. H. 569. This is because the owner is justified in supposing, until contradicted, that the user is under the continuing license. But in the principal case the plaintiff's rights ceased at once by operation of law, and the subsequent user was both hostile and notorious. No other recognized element being absent, the user must be considered adverse. This result seems somewhat harsh, since an owner apparently safe in permitting a way of necessity may suffer a curtailment of his rights by the mere opening of an unknown road on another's property. The requirement would not be unreasonable, that, to be adverse, the user must not only be notorious and hostile, but that its hostility be notorious as well.

EMINENT DOMAIN — WHAT PROPERTY MAY BE TAKEN — LAND ALREADY OCCUPIED FOR RAILROAD PURPOSES. — A railroad company owned two strips of land between its own right of way and the parallel roadway of another company. It was shown that the strips were not necessary for the owner's business, nor likely to be so. *Held*, that the second company may condemn a portion of each tract, in widening its right of way. *Chicago, etc., Electric R. R. Co. v. Chicago, etc., Ry. Co.*, 71 N. E. Rep. 1017 (Ill.).

The power to condemn any property devoted to public uses must be expressed or very clearly implied in the legislative enactment authorizing appropriation. *In re City of Buffalo*, 68 N. Y. 167. Thus, a railroad's general statutory power of condemnation does not ordinarily include the right to appropriate land already occupied by another railroad. *Housatonic, etc., R. R. Co. v. Lee, etc., R. R. Co.*, 118 Mass. 391. But, as the present case holds, this exception does not apply where the property is not in use and not necessary for the purposes of the railroad owning it. *In re Rochester, etc., R. R. Co.*, 110 N. Y. 119. In an earlier Illinois case the same statute was held not to authorize condemnation longitudinally of another road's right of way. *Illinois, etc., R. R. Co. v. Chicago, etc., R. R. Co.*, 122 Ill. 473. The present case distinguishes this on the ground that no right of way is involved in the later case. There is, however, no reason why the doctrine of the principal case might not apply with equal force to an unused strip of a right of way. *Cf. New York, etc., R. R. Co. v. Forty-Second Street, etc., R. R. Co.*, 26 How. Pr. (N. Y.) 68. If the cases are to be reconciled, it must be on the ground that in the earlier case it did not appear that the part of the right of way involved was unused.

EQUITABLE ELECTION — APPLICATION OF THE DOCTRINE WHERE THE LEGATEE IS GIVEN PROPERTY TO WHICH HE IS BY LAW ENTITLED. — A testator bequeathed all his personal property to his wife, and devised certain real estate, which, in fact, was her separate property, to her for life, remainder to his son. His widow proved the will, and retained all the personalty, valued at one hundred dollars. By the code she was entitled to three hundred dollars worth of her husband's personalty. The plaintiff, her executor, petitioned to sell the real estate. *Held*, that he is barred by the election of his testatrix. *Tripp v. Nobles*, 48 S. E. Rep. 675 (N. C.). See NOTES, p. 302.

ESTOPPEL — ESTOPPEL IN PAIS — RIGHTS OF ASSIGNEE OF ESTOPPEL-ASSERTER. *Semble*, that where an innocent holder of municipal bonds good only on the ground of estoppel, sells them to a purchaser having full knowledge of the facts, any recovery by the latter in a suit on the bonds is limited to the amount he has paid for them. *Gamble v. Rural Independent School District*, 132 Fed. Rep. 514 (Circ. Ct., N. D. Ia.). See NOTES, p. 302.

FEDERAL COURTS — JURISDICTION — THE UNITED STATES A PARTY. — A federal statute required every contractor for public works to execute a bond to the United States conditioned upon performance of the contract and upon payment of persons supplying materials, and further provided that any one supplying materials might sue on this bond to his own use in the name of the United States. A materialman brought an action under this statute. *Held*, that since the United States is a real party, the federal courts have jurisdiction. *United States v. Churchyard*, 132 Fed. Rep. 82 (Circ. Ct., Dist. of R. I.).

The court decided that through its assumption of a public duty to protect materialmen, the position of the United States as a party was analogous to its position in those cases which hold that though entirely without pecuniary interest, the United States, because of its public obligation to protect patents, may maintain a bill to set aside a patent obtained by fraud. *United States v. Bell Telephone Co.*, 167 U. S. 224. But in the patent cases the United States is the real party suing, often undertaking the suit on its own initiative, for the benefit of no particular person. *United States v. Bell Telephone Co.*, 128 U. S. 315. And if the suit be solely for the benefit of a third person, jurisdiction will be refused. See *United States v. San Jacinto Tin Co.*, 125 U. S. 273. In the principal case the United States is not really suing; it possesses no initiative, and the suit is always for the benefit of a third party. Therefore, since the federal courts assume jurisdiction on the basis of the real, rather than the nominal parties to an action, two other decisions in which jurisdiction was denied seem to have reached the better result. *United States v. Henderlong*, 102 Fed. Rep. 2; *United States v. Sheridan*, 119 Fed. Rep. 236.

HIGHWAYS — ESTABLISHMENT — USE UNDER A MISTAKE AS THE BASIS OF A PRESCRIPTIVE RIGHT. — Through a mistake in location a highway was for some distance laid out fifty-seven feet south of a section line along which it was authorized to run; and was maintained and used for more than twenty years. *Held*, that a right of way by prescription has not been created. *Shanline v. Wiltzie*, 78 Pac. Rep. 436 (Kan.).

Upon the question whether possession under a mistake constitutes adverse user the authorities are not altogether in accord. It may be granted that one who holds property provisionally, clearly intending to claim only his own, gains no title, since his possession and claim of right do not correspond. See *Grim v. Murphy*, 110 Ill. 271. But when a party, though under a mistake, lays claim to land and uses it as his own, the requirements of a prescriptive right would seem to be fulfilled, as well as if he knew the land belonged to another. *Bales v. Pidgeon*, 129 Ind. 548; see *Moore v. Wiley*, 44 Kan. 736. The present case appears to come within the latter principle. *Landers v. Town of Whitefield*, 154 Ill. 630. Several cases of the sort, however, agree with the court that while the public use the actual way, their claim is only to a way along the true line — a somewhat difficult conception — or go upon the broad ground that possession under a mistake is not adverse. *State v. Welpton*, 34 Ia. 144.

HIGHWAYS — INJURIES FROM OBSTRUCTIONS — LIABILITY OF STREET RAILWAY. — The operatives of the defendant's car, finding an obstruction which had been unlawfully placed upon the track, moved it a sufficient distance to allow the car to pass. Shortly afterwards the plaintiff was injured by riding into it in the darkness. *Held*, that the defendant owed no duty to the plaintiff to remove the obstruction from the highway. *Howard v. Union Ry. Co.*, 57 Atl. Rep. 867 (R. I.). See NOTES, p. 303.

INDIANS — POWER OF GOVERNMENT AGENT TO COLLECT TAX LEVIED BY INDIAN TRIBE. — Acts of Congress and a treaty denied to an Indian tribe any jurisdic-

tion over white persons and their property, but provided that white persons not authorized by the Indians to remain should be considered intruders, who might be removed by government agents unless they were in possession of town lots. Upon refusal of the plaintiffs, who owned such lots, to pay a trading-license imposed by the Indian tribe, the defendant, a government agent, closed their place of business. *Held*, that the defendant's action will not be enjoined. *Buster & Jones v. Wright*, 82 S. W. Rep. 855 (Ind. T.).

The defendant's action can hardly be supported as a legal collection of a tax, since the tribe had jurisdiction over neither the persons nor the property taxed. *The New York Indians*, 5 Wall. (U. S.) 761. Furthermore, although the treaty expressly gave the Indians the right to designate who should reside in their territory, and although they withheld permission from the plaintiffs because of their failure to pay the trading license, there seems on the face of the statute no way of enforcing the treaty provisions against the plaintiffs, since the remedy provided by removal could not be used against a town resident. But the Indian agent had power to regulate intercourse with the Indians. In closing the plaintiffs' place of business, then, he was not acting as a collector of taxes, but was making a reasonable use of his powers, as such agent, to enforce the treaty. And this he should be allowed to do by any means not expressly prohibited by statute.

INTERPLEADER — EFFECT OF PRIOR DECREE IN FAVOR OF ONE DEFENDANT. — The plaintiff's creditor made two assignments of his claim. The plaintiff then brought a bill of interpleader against the first assignee and a judgment creditor of the second assignee, who had obtained a decree requiring the plaintiff to pay him the amount of the claim after both had learned of the first assignment. *Held*, that the bill will lie, since the plaintiff's laches did not mislead the claimant who obtained the decree. *City of New York v. Cody*, 44 N. Y. Misc. 270.

An interpleader must ordinarily be sought before either claimant has obtained a judgment, since otherwise the petitioner would have two opportunities to litigate one of the claims against him. *Holmes v. Clark*, 46 Vt. 22. No previous case has been found in which an interpleader was sought after a decree in equity, but as an interpleader after decree would give the plaintiff the same unfair advantage as after judgment, it is submitted that the same rule should apply in both cases. In a few instances where the plaintiff has an excuse for not having brought his bill sooner, this general rule does not apply. *Lozier's Executors v. Van Saun's Administrators*, 3 N. J. Eq. 325; *Cannon v. Kinney*, 1 Smed. & M. Ch. (Miss.) 555. But after judgment or decree, he is *prima facie* guilty of delay, and ought not to be allowed to file a bill without satisfactorily explaining his failure to file it before. *Cf. Cornish v. Tanner*, 1 Y. & J. 333. The plaintiff in the principal case knew of the first claim before his liability became fixed by the decree, and in allowing him to bring his bill after that time the decision seems to be making a questionable exception to the general rule.

JUDGMENTS — FOREIGN — DECREE OF ADOPTION OBTAINED BY FRAUD. — In an action in the state of Washington to quiet title, the case turned on whether the defendant was the adopted child of the plaintiff. The latter declared that, by the law of Iowa, where it purported to have taken place, the adoption was void, because induced by false representations that the defendant's natural mother was dead. *Held*, that a demurrer to the declaration must be sustained. *James v. James*, 35 Wash. 655.

In Iowa, adoption is accomplished by filing, in the office of the county recorder, an instrument signed by the adoptive, and, with some exceptions, the natural parents of the child. Code of Iowa, 1897, §§ 3251, 3252. This law not having been properly set forth in the declaration, the court assumed that Iowa law was the same as that of Washington, under which adoption is by decree of the Superior Court. Such a decree is held to take effect *in rem* upon the child, and is valid in other jurisdictions. *Van Maistre v. Sinkey*, 148 Ill. 536. The Supreme Court of Washington might possibly, on appeal, reverse a decree of adoption by the Superior Court on the ground that fraud had been practised in obtaining it. See *Booth v. Van Allen*, 7 Phila. (Pa.) 401. But granting the power of an Iowa court to consummate adoptions of extra-territorial validity, and assuming a formal decree by such a court, the Washington tribunal could hardly disregard it on the ground that facts had been suppressed, when it was secured; although the Iowa Supreme Court, according to Washington law, might have done so.

JUDGMENTS — WHAT CONSTITUTES — DECREE OF FORECLOSURE. — The Kansas civil code provides that, unless execution be sued out within five years from the date of any judgment, the judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor. *Held*, that a decree of sale of real estate

under foreclosure proceedings is a judgment within the meaning of the section. *Killen v. Nebraska, etc., Co.*, 78 Pac. Rep. 159 (Kan.).

The principal case overrules a very recent Kansas case, which in its turn had overruled a still earlier one, decided in 1870. *Cf. Watson v. Keystone Ironworks Co.*, 74 Pac. Rep. 269; *The State v. McArthur*, 5 Kan. 280. Section 10 of the Kansas code abolishes the distinction between actions at law and suits in equity, and section 305 defines a judgment as "the final determination of the rights of the parties in an action." These sections would appear to be conclusive of the matter, and in other code states similar provisions are so taken. *Stout v. Macy*, 22 Cal. 647. The opposite construction depends on the authority of an Ohio case. *Cf. Beaumont v. Herrick*, 24 Oh. St. 445. This case, however, may be explained on the ground that the Ohio code provided no execution applicable to a foreclosure decree. The Kansas statute provides, to be sure, for the extinguishment of the judgment lien as well as for the dormancy of the judgment; and it might be argued that, since a foreclosure decree confers no lien, such a decree does not fall within the statute. See *Butt v. Maddox*, 7 Ga. 495. The more liberal construction seems, however, fully justified on a fair interpretation of the various sections.

LANDLORD AND TENANT—REPAIR AND USE OF PREMISES—DUTY TO WARN TENANT OF HIDDEN DANGERS.—A landlord leased part of a building to the plaintiff. Before the time fixed for entry he discovered hidden defects in parts of the building not leased to the plaintiff which made the building unsafe, but said nothing to the tenant, who entered. Soon after, the municipal authorities compelled the landlord to demolish the building, and the tenant sued him for damage to his goods and fixtures caused by the enforced removal. *Held*, that the tenant may recover, as the damage was the natural consequence of the maintenance of a public nuisance by the landlord. *Steefel v. Rothschild*, 179 N. Y. 273.

A man is liable for the natural and proximate consequences of his acts, and the causal connection is not broken by the rightful act of a third person, if such act was probable. *Harrison v. Berkley*, 1 Strobb. (S. C.) 525; *Radway v. Briggs*, 37 N. Y. 256. As the enforced abatement of a public nuisance is a probable consequence of committing it, the damages here were the proximate result of the landlord's illegal act. It follows that, since a private individual may recover for particular damage, direct or consequential, caused by the existence of a public nuisance, the decision of the court is sound. See *Lansing v. Smith*, 4 Wend. (N. Y.) 9, 25. It might be put on a broader ground, however. The tenant of a part of premises may move out and need pay no subsequent rent if a defect is discovered in a portion not under his control, which renders his portion unfit for occupancy. *Sully v. Schmitt*, 147 N. Y. 248. It would seem, therefore, that the landlord's failure to disclose the hidden defects defrauded the tenant of his right not to enter, and would make him liable for damages naturally resulting. *Cf. Maywood v. Logan*, 78 Mich. 135.

LEGACIES AND DEVICES—VOID OR VOIDABLE—LEGACY UPON SECRET TRUST FOR WITNESS.—The testator willed his personal estate to the plaintiff under a secret, oral trust for five beneficiaries, among them a witness to the will. The English Wills Act annulled legacies and devises given by a will to witnesses thereof. *Held*, that the witness does not forfeit her right under the secret trust. *O'Brien v. Condon*, 38 Ir. L. T. 252 (Ir., Ch. D.).

A trust in favor of a witness would probably be void if expressed in the will. See *Holdfast v. Dowling*, 2 Stra. 1253. The English law, in opposition to the principal case, has dealt in the same manner with a secret trust. *In re Fleetwood*, L. R. 15 Ch. D. 594, 609. The court here goes upon the ground that the interest of the witness is not, in the meaning of the statute, a legacy given by the will, but is even contrary to its express provisions. No American cases have been found upon this question. But it has been held that a charity which is the beneficiary of a secret trust does not take under the will so as to exempt the legacy from taxation. *Cullen v. Attorney-General*, L. R. 1 H. L. 190; see *Matter of Edson*, 38 N. Y. App. Div. 19. This reasoning seems technically correct, and is perhaps unobjectionable in its results. The statute aims only to deprive a witness of such interest in the testator's estate as would make him incompetent; and an interest not mentioned in the instrument, and of which the witness is ignorant, as here, could not affect his competency. Where the trust was known to the witness a different result might be reached.

MASTER AND SERVANT—DUTY OF MASTER TO PROVIDE SAFE APPLIANCES—CONTRACTS LIMITING LIABILITY.—In his contract of service with an express company, the plaintiff, its employee, agreed to assume all risks of injury, whether occasioned by the negligence of the company or otherwise. The plaintiff was injured through the company's negligence in furnishing a defective appliance. *Held*, that he may recover,

as the contract is against public policy and void. *Johnson v. Fargo*, 90 N. Y. Supp. 725.

The law of New York upon this point has been doubtful. Cf. *Purdy v. Rome, etc., R. R. Co.*, 125 N. Y. 209; *Shepard v. New York, etc., R. R. Co.*, 18 N. Y. Supp. 665. An Ohio statute similar to the rule announced by the principal case has been held unconstitutional as impairing the right of freedom to contract. *Shaver v. Pennsylvania Co.*, 71 Fed. Rep. 931. But although that right should be jealously safeguarded, in a case where it strongly contravenes the interest which the state has in the lives, health, or safety of its citizens, a statute to protect persons whose unequal position renders self-protection impossible would seem constitutional. See *Holden v. Hardy*, 169 U. S. 366. Contracts to waive the protection afforded by Employers' Liability Statutes against negligence of fellow-servants are enforced in England. *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357. In this country, however, they are held to be against public policy. *Lake Shore, etc., Ry. Co. v. Spangler*, 44 Oh. St. 471. Public interest would seem to condemn more strongly contracts which encourage the master's own negligence than those which limit his liability for negligence of co-employees. The principal case proceeds upon the same policy as these similar cases; is in harmony with the trend of modern legislation; and, in view of the necessities of present industrial conditions, its effect is salutary. The weight of authority is in accord. *Roesner v. Hermann*, 8 Fed. Rep. 782.

NEW TRIAL — GROUNDS FOR GRANTING — IMPROPER CONDUCT OF COUNSEL. — In a suit for personal damages by the defendant's employee, the plaintiff's counsel, after being allowed to show that the defendant was insured against liability, asked him if the insurance company would pay his lawyers. This question was not allowed. *Held*, that the defendant is entitled to a new trial. *Iverson v. McDonnell*, 78 Pac. Rep. 202 (Wash.).

One of the grounds of the decision is that it is reversible error to ask a question as to the defendant's liability insurance, even though the objection to the question is sustained. It is true that if a defendant is insured, evidence of that fact should not be admitted. *Sawyer v. Arnold Shoe Co.*, 90 Me. 369. If, after objection, the plaintiff's lawyer is allowed to state the fact to a juror, it is reversible error. *George A. Fuller Co. v. Darragh*, 101 Ill. App. 664. And there will be a reversal of the plaintiff's judgment if his counsel persists in asking questions to bring forth such fact when the court has sustained an objection to similar questions. *Manigold v. Black River Traction Co.*, 80 N. Y. Supp. 861. But the argument that a judgment should be reversed because the jurors have by inference learned of a fact which they should not know when there has been neither wrong ruling by the court in reference thereto nor misconduct of counsel or jury, is believed to go far beyond present authority.

SALES — RIGHTS AND REMEDIES OF BUYERS AND SELLERS — SPECIFIC PERFORMANCE AT LAW. — A purchaser refused an article manufactured on his order. *Held*, that the vendor may, at his election, retain the property for the purchaser, and recover the contract price as the measure of his damages. *Kinhead v. Lynch*, 132 Fed. Rep. 692 (Circ. Ct., Dist. of Nev.). See NOTES, p. 298.

TITLE, OWNERSHIP, AND POSSESSION — FINDING LOST GOODS — LAND OWNER'S RIGHT TO CHATTELS FOUND ON HIS LAND. — The lessee of land found a quantity of gold-bearing quartz buried in the soil in a sack. *Held*, that it belongs to the owner of the land and not to the finder. *Ferguson v. Ray*, 77 Pac. Rep. 600 (Ore.).

The rule that the finder of lost property keeps it as against everybody but the true owner was based on the reason that in order to defeat the finder's possession the claimant must show a prior possession or title. *Bridges v. Hawkesworth*, 21 L. J. 75. Without considering at length any doctrine of possession, the American courts, following authority, have generally held that the finder keeps the property no matter where it is found. *Durfee v. Jones*, 11 R. I. 588; *Hamaker v. Blanchard*, 90 Pa. St. 377. A late decision in Oregon, apparently overruled by the principal case, is to that effect. *Danielson v. Roberts*, 74 Pac. Rep. 913 (Ore.); see 17 HARV. L. REV. 425. The English courts hold that control of a chattel, though its existence be unknown, coupled with an intent to exclude others from unauthorized interference, constitutes possession. Upon that theory they give articles found in private land to the owner thereof, as a possessor prior to the finder. *Elwes v. Brigg Gas Co.*, L. R. 33 Ch. D. 562; *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44. The present case follows these English decisions. If the intent necessary for possession be a positive intent to exercise the control for one's self, the American cases are right, for the finder is, in general, the first party succeeding the loser to have that intent.

TORTS — LIABILITY OF MAKER OR VENDOR OF CHATTEL TO THIRD PERSONS INJURED BY ITS USE. — The defendant contracted to keep in repair the vans of a mineral water company. This he did so negligently that a van broke, injuring its driver, who brought suit against him in tort. *Held*, that the plaintiff may not recover, as the defendant owes him no duty of care. *Earl v. Lubbock*, 21 T. L. R. 71 (Eng., C. A.).

For a discussion of the principles involved, see 6 HARV. L. REV. 261.

TRADE MARKS AND TRADE NAMES — MARKS AND NAMES SUBJECT OF OWNERSHIP — PERSONAL NAMES. — The plaintiff had for years been selling in bottles a cement known as "Van Stan's Stratena Cement." The defendant, Van Stan, in a neighboring place of business, sold cement in similar bottles labelled "Van Stan's Cement," with intent to trade and thereby trading on the plaintiff's reputation. *Held*, that the defendant will be enjoined from using the name "Van Stan's Cement" in labelling and exposing his goods for sale. *Van Stan's Stratena Co. v. Van Stan*, 58 Atl. Rep. 1064 (Pa.).

For a discussion of the principles involved, see 18 HARV. L. REV. 56.

TRUSTS — CESTUI'S INTEREST IN THE RES — APPORTIONMENT OF LOSS BETWEEN TENANT FOR LIFE AND REMAINDERMAN. — A fund, held in trust to pay the income to a *cestui* for life, was invested in a mortgage. The interest was irregularly paid, and ultimately the security was realized at a considerable loss. Upon a bill brought by the life tenant for arrears of interest, it became necessary, in apportioning the amount received, to determine whether payments made to him before the loss should be taken into consideration. *Held*, that the proceeds should be divided between principal and interest in the proportion that the original fund bears to the arrears of interest, without reference to any sums received by the *cestui* for life. *In re Atkinson*, 53 W. R. 7 (Eng., Ch. D.).

On the question here raised, the American courts agree with the present decision. *Hagan v. Platt*, 48 N. J. Eq. 206; *Parsons v. Winslow*, 16 Mass. 361. The English authorities, however, are in conflict. One line of decisions holds that such payments should be added to the net proceeds, and this total sum divided between the two estates in proportion to what each would have received, had there been no loss. *In re Foster*, 45 Ch. D. 629. Other decisions uphold the principal case. *In re Moore*, 54 L. J. Ch. 432. The defect of the former rule is that a life tenant, having rightfully received payments, might by that method of apportionment get nothing, or even be required to refund; but it is clear that such payments, being made in accordance with the trust, cannot be recovered. Logic certainly is with the contrary position, that the loss ought to affect only such claims as are still unsettled at the date thereof. The rule of *In re Foster* should be applied only where the loss occurs after a breach of trust, when it becomes necessary to place the parties as nearly as possible in the position occupied at the time of the default. *Cf. In re Bird*, [1901] 1 Ch. 916.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE DOCTRINE OF STARE DECISIS. — The appalling multiplication of our law reports has furnished the text for much discussion of a situation of universally admitted gravity. The latest deliverance on the subject is of an ultra-pessimistic tinge. In a recent number of the Michigan Law Review Mr. Edward B. Whitney comes out squarely with the prophecy that "within the lifetime of men already admitted to the bar" the doctrine of *stare decisis* will have been avowedly abolished, and the Continental method of treatment of judicial decisions substituted therefor. *The Doctrine of Stare Decisis*, by Edward B. Whitney, 3 Mich. L. Rev. 891 (Dec., 1904).

¹ A paper read at the section of Private Law of the Congress of Arts and Science, at St. Louis, September, 1904.

The efficiency of our system of judge-made law depends, the author begins by pointing out, on the thorough familiarization by both counsel and court with all the precedents bearing on the issue, and on the exhaustive discussion of them in argument. Accordingly, as the law grows and precedents multiply, there is required "a greater expenditure of time at four different points — in the preliminary preparation by counsel, in the oral argument, in the court's subsequent examination of the authorities, and in their discussion in the opinion." But such to-day is the press of business both in and out of court that "instead of expending more time all parties expend less." The result, in the more crowded federal and state courts, is already apparent. "It is increasingly common to hear successful practitioners say that they find less attention given now to precedent than formerly." A symptom of the breakdown, it is asserted, is perceivable in a growing tendency of the courts to rely on *dicta* and on general statements of law in text-books and encyclopedias.

The futility of remedies that look merely to the curtailment of opinion-writing is obvious, as Mr. Whitney observes. The suppression of dissenting opinions, the official publication of only the more important decisions, or the omission altogether of written opinions at the court's discretion, — all such remedies are at best mildly palliative, and generally entail "a partial abandonment of the very advantage which we have been taught we possess over other systems of jurisprudence." The only suggestion which seems to the author to offer any promise of practical relief is that of a sort of common law *index expurgatorius*, — a legislative list of decided cases to which the doctrine of *stare decisis* should no longer be applied. But even for this plan no particular enthusiasm is manifested.

As to codification, Mr. Whitney's position is rather interesting. Admitting freely the failure hitherto of all efforts in that direction to reduce the volume of appeals, and seemingly attributing the cause to the ineradicable perversities of human nature, he nevertheless cherishes the faith that when the situation has become sufficiently acute, a great school of codifiers will arise, whose work, with the backing of a united bar, will be forced, ungarbled by amendment, through the récalcitrant legislatures.

CORPORATIONS IN THE DISTRICT OF COLUMBIA. — Has a corporation organized under the provisions of the "Code of Laws for the District of Columbia," if sued in a state court, the right of removal of the case to a federal court? This is the principal question which Mr. Fred Dennett of the District of Columbia Bar attempts to answer in a recent article. *Corporations in the District of Columbia*, 32 Wash. L. Rep. 758 (Nov. 25, 1904). The writer's views are, briefly stated, as follows. As between individuals one of whom is a citizen of the District of Columbia this right of removal to a federal court on the ground of diversity of citizenship does not exist. *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445. There can, however, be no such citizenship of a corporation in the District of Columbia as to bring it within the inhibitions laid down in this case, since in the United States a corporation can be created only by a sovereign power, and there is no sovereign power, and therefore no power of creation of corporations, in the District of Columbia. Congress in exercising its constitutional legislative authority over the District of Columbia acts, not in a separate capacity as a local legislature, but as the legislative body of the United States, its enactments being limited in application to the territory established as the seat of government. *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 424. The "Code of Laws for the District of Columbia" is therefore federal legislation, and any corporation organized thereunder is a corporation organized under the laws of the United States. The final conclusion from this is that any suit to which such a corporation is a party necessarily involves a federal question, and on this ground there exists in every case the right of removal to the federal courts.

Whatever may be the logic of the writer's first contention, it does not seem to bear materially upon his conclusion; for, even if a contrary view were adopted

in regard to the citizenship of District of Columbia corporations, it would obviously not prevent the removal of a cause on the broader ground of a federal question being involved. That this would be a proper ground for removal in cases turning on a proper interpretation of the act of Congress creating the corporation is evident. But it is hard to understand how all suits to which the corporation is a party can be said to arise under laws of the United States. What federal question is involved, for example, in an ordinary tort action brought against the corporation in a state court? Nevertheless the writer's conclusion in its broad form seems to be established by the authorities. *Pacific R. R. Removal Cases*, 115 U. S. 2; *Butler v. National Home*, 144 U. S. 64, 66. National banks present only an apparent exception, as the right of removal has there been expressly limited by act of Congress. *Ex parte Jones*, 164 U. S. 691.

LOCUS OF SALES C. O. D. — In the case of a shipment of goods through a carrier C. O. D., the question arises as to where the sale takes place. One group of decisions holds, according to the Pennsylvania rule, that title passes to the vendee at the point of shipment, possession alone being retained, under a vendor's lien. Another group, following the Vermont rule, holds that in such cases the sale takes place and title is transferred only at the place of ultimate destination, on payment of the price and delivery of the goods. There are several instances in which this question is of vital importance, as in determining which jurisdiction may take cognizance of the validity of the sale; in deciding the criminality of the vendor in case of sales prohibited in one place but allowed in the other; in ascertaining the place of prosecution when such sales are criminal under the laws of both jurisdictions; and in determining the person upon whom the loss shall fall in case of injury or destruction of the goods in transit. The subject is interestingly presented in a recent article in the Columbia Law Review. *The Locus of Sales C. O. D.*, by Charles Noble Gregory, 4 Columbia L. Rev. 541 (Dec. 1904). The writer makes a lengthy and careful review of the decisions in point, showing that the decided weight of authority supports the rule that title passes upon delivery to the carrier. This is not only more in harmony with the general law of sales, but it completely carries out the intention of the parties by giving the vendor security, and still passing title and, along with it, the risk, to the vendee. The Vermont rule, on the other hand, is objectionable in that it subjects consignors to criminal prosecution under a strained presumption as to their knowledge of laws in force at remote points. It tends to hamper many large and useful branches of trade, for it makes dealers hesitate to ship any commodity C. O. D. the sale of which has ever been placed under restriction, without first carefully informing themselves as to the statutes and even the local ordinances in force at the point of destination. It bears more heavily upon the small dealers without established credit, to whom shipments are most frequently made C. O. D., than upon large dealers whose credit is established. And finally the Vermont rule is based upon the erroneous supposition that the carrier in this class of cases is exclusively the agent of the consignor. The writer concludes by suggesting a clause embodying the substance of the Pennsylvania rule for incorporation in the proposed "Draft of an Act Relating to the Sale of Goods."

NECESSITY FOR TRANSFER OF STOCK ON BOOKS OF COMPANY. — In view of the rapidly increasing wealth, magnitude, and number of corporations, and the prevalent business practice of using the stock as collateral security on which to obtain credit, the question as to the respective rights and duties of the various parties interested in its transfer is one of constantly growing importance. The Central Law Journal presents a carefully prepared article in point. *What Constitutes a Complete Transfer of Stock as against Third Parties*, by Romney L. Willson, 59 Cent. L. J. 448 (Dec. 2, 1904). The author calls atten-

tion to the mass of confused and conflicting decisions resulting from the varying relative weight given two opposing tendencies, the demand for greater facility of transfer in the business world on the one hand, and the desirability of better protection and assurance by means of registration on the other. According to the trend of decisions the *bona fide* conveyance of stock certificates to a purchaser for value or to a pledgee is valid as against a subsequent judgment creditor without notice, even though there has been no actual transfer on the books of the company. The argument advanced in support of this position is that stock-certificates should be treated more in the nature of negotiable instruments, and that to require the purchaser or the pledgee to record transfers upon the company's books would be an inconvenience. But there are strong objections to considering stock-certificates in this light, for their ownership carries with it liability to assessment and right to vote as well as the benefit of dividends, so that it is very essential for the corporation to know who are its shareholders, — so essential, in fact, that companies make all transfers on their books and issue new certificates without charge, rendering the hardship to the individual much less than that to which a vendee or mortgagee of realty is subjected by the recording acts. Therefore the interest of the corporation is in harmony with the policy of the law, that the transfer of such property as stock, which is hard to trace, easy to secrete, and therefore readily available for secret trusts and frauds, should be accompanied by some formal act such as registration on the books of the company to give notice of the true ownership. This would render difficult a disposition of stock in fraud of creditors, and would prevent the seller or pledgor from obtaining a fictitious credit by means of an apparent ownership.

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- APPEALS ON MATTERS OF FEDERAL JURISDICTION. *H. B. Higgins*. 2 Commonwealth L. Rev. 3.
- APPELLATE TRIBUNALS FOR THE COLONIES. *Robert Stout*. 2 Commonwealth L. Rev. 3.
- AVOIDANCE OF RELEASES IN PERSONAL INJURY CASES. *Cyrus J. Wood*. 59 Cent. L. J. 404.
- BURDEN IN CRIMINAL CASES. *R. Srinivasa Aiyangar*. Discussing Indian law and English authorities on burden of proof. 1 Crim. L. J. of India 235.
- CODIFICATION DU DROIT INTERNATIONAL PRIVÉ, LA. *T. M. C. Asser*. An account of a conference held at The Hague, including the text of the agreement then adopted to be submitted to the powers. 6 Rev. de Droit Internat. 516.
- COMPULSORY VACCINATION. *Anon.* 8 L. Notes (N. Y.) 405.
- CORPORATIONS IN THE DISTRICT OF COLUMBIA. *Fred. Bennett*. 32 Wash. L. Rep. 758. See *supra*.
- CRIMINAL LAW AS AFFECTED BY COMMONWEALTH LEGISLATION. *Charles T. Russell*. 2 Commonwealth L. Rev. 14.
- DOCTRINE OF STARE DECISIS, THE. *Edward B. Whitney*. 3 Mich. L. Rev. 89. See *supra*.
- EFFECT OF LETTERS OF ADMINISTRATION OBTAINED PENDENTE LITE, THE. *Anon.* Discussing the question of their relation back. 49 Can. L. J. 836.
- GUERRE RUSSO-JAPONAISE ET LE DROIT INTERNATIONAL, LA. *M. H. Nagaoka*. Reviewing the conduct of Japan throughout and justifying it. 6 Rev. de Droit Internat. 461.
- INTERFERENCE WITH BUSINESS AND COMMERCIAL RELATIONS BY THIRD PARTIES. *Wm. H. Warren*. Discussing boycotts and kindred practices. 49 Can. L. J. 794.
- IS THERE A FEDERAL POLICE POWER? *Paul Fuller*. Showing the origin and the extent of federal police power and the measure in which its exercise has superseded the police power of the states. 4 Columbia L. Rev. 563.
- JUDICIAL HISTORY OF INDIVIDUAL LIBERTY, THE. XI. *Van Vechten Veeder*. 16 Green Bag 725.
- LAW IN THE LOUISIANA PURCHASE. *William Wirt Howe*. A short historical treatment of the introduction and development of law in the Louisiana Purchase. 14 Yale L. J. 77.
- LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENCE IN THE TRANSMISSION AND DELIVERY OF MESSAGES. V., VI. *Graham B. Smedley*. 10 Va. L. Reg. 587.
- LOCUS OF SALES C. O. D., THE. *Charles Noble Gregory*. 4 Columbia L. Rev. 541. See *supra*.

- OLD COMMON LAW AND THE NEW TRUSTS, THE. *Ditlew M. Frederiksen*. Arguing that the old common law relating to monopoly should be applied to-day irrespective of combination. 3 Mich. L. Rev. 119.
- OLD ROMAN LAW AND A MODERN AMERICAN CODE, THE. *Joseph H. Drake*. Comparison of the recent Porto Rico Code with the Spanish civil code formerly in force. 3 Mich. L. Rev. 108.
- PRESUMPTIONS OF DEATH AND OF SURVIVORSHIP AND PROOF THEREOF. *S. S. Merrill*. 59 Cent. L. J. 464.
- PROBLEMS OF INTERNATIONAL LAW, SOME. *Charles Noble Gregory*. Discussing questions arising in the Russo-Japanese war. 14 Yale L. J. 82.
- PROBLEMS OF ROMAN LEGAL HISTORY. *Munroe Smith*. Comparing the development of the common law with that of the Roman Law. 4 Columbia L. Rev. 523.
- PROBLEMS OF THE RESTRAINT OF TRADE DOCTRINE. I., II. *Anon.* 49 Sol. J. 28, 49.
- QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR, SOME. VII. *Amos S. Hershey*. 16 Green Bag 744.
- TRUSTS CONTRARY TO THE POLICY OF THE LAW. *A. H. Marsh*. An enumeration of the various instances of invalid trusts. 24 Can. L. T. 395.
- WHAT CONSTITUTES A COMPLETE TRANSFER OF STOCK AS AGAINST THIRD PERSONS. *Romney L. Wiltson*. 59 Cent. L. J. 448. See *supra*.
- WHEN AND IN WHAT CASES WILL PAROL EVIDENCE BE ADMITTED TO SHOW THE REAL CONSIDERATION FOR A WARRANTY DEED. *Walter J. Lutz*. 59 Cent. L. J. 423.

II. BOOK REVIEWS.

CURRENT LAW. A Complete Encyclopedia of New Law. Volumes I. and II. Edited by George Foster Longsdorf and Walter A. Shumaker. St. Paul, Minn.: Keefe-Davidson Company. 1904. pp. x, 1-1208; xviii, 1209-2195. 4to.

One of the marked characteristics of the busy age in which we live is the demand insistently made in every branch of human activity for time-saving devices. That the demand in the legal profession has not found an adequate response the present universally crowded condition of court dockets amply testifies. Only radical measures, apparently, can relieve a situation which merely grows in complication with the rapid multiplication of reporter series. Thus far no solution seems to have been found. In the meantime any device which materially aids to bring some measure of order out of the chaos is warmly received by the profession. If, then, "Current Law" proves to be a substantial improvement upon the familiar annual digests, its success is clearly assured.

From an examination necessarily limited in character the claims made for it by its makers seem to be well founded. "Current Law" is a combination digest and encyclopedia covering all the current reported cases which appear in the United States. The law of the cases is stated in paragraphs like those of an encyclopedia, with foot-notes giving citations and distinctive facts wherever necessary. Frequently cases recognizing the same legal principle are classified in the foot-notes according to their facts. This plan enables the compiler to cite the same case frequently and to avoid an elaborate system of cross references, which is more or less confusing. Another valuable feature of the work, and one which distinguishes it from other annual digests, is the annotations in text-book style upon difficult points of law. The work is issued monthly as well as in bound volumes at the end of the year. The various subjects are taken up in alphabetical order, beginning with A in the first and ending with Z in the last number of the year, each month's issue being complete for a whole year upon the subjects treated. This plan has the apparent merit of enabling the compilers, by concentrating attention upon particular subjects, to do better work, and puts but slight accompanying inconvenience upon subscribers. These advantages appear on the surface. Whether or not they are intrinsic and substantial, extended usage alone will demonstrate.

HANDBOOK OF THE LAW OF PUBLIC CORPORATIONS. By Henry H. Ingersoll. St. Paul, Minn.: West Publishing Co. 1904. pp. xvii, 738. 8vo.

This book is one of the latest additions to the excellent Hornbook Series, which now numbers some thirty uniform treatises upon as many different legal topics. This series is rapidly becoming, not merely a complete library of elementary text-books for the student, as it was primarily intended, but also a most convenient encyclopedia for the use of the bar generally.

The present volume follows the same general plan and method of treatment as its predecessors. It is divided into three distinct parts dealing respectively with the topics Quasi-Corporations, Municipal Corporations, and Quasi-Public Corporations. The first division treats of the characteristics, powers, and liabilities of counties, townships, and other analogous bodies. The second discusses on similar lines the chartered municipal corporation proper, going much more fully, however, into its powers and duties than is attempted in the previous section. This constitutes the largest and most valuable portion of the work. The third division is a general outline of the status of some of the principal classes of public service corporations. This section, however, will be of value only as a most general summary, for the subject is by far too large a one to be condensed into the space of one hundred pages. It deserves treatment in a separate volume.

No comment need be made upon the character of the discussions. The principles involved are carefully and concisely stated, and a very full collection of cases, including many recent ones, is made. It may be noted that nowhere in the volume are so-called charitable corporations in any way treated, although such corporations in many particulars come within the scope of its title. Most writers on private corporations also neglect this class, and the result is that it is difficult to find any adequate text-book treatment of the peculiar principles that govern the rights and liabilities of these bodies. It is suggested that such a topic be included in some future volume. As far as it goes, however, the present work is distinctly commendable.

W. H. H.

THE UNITED STATES AND THE STATES UNDER THE CONSTITUTION. By C. Stuart Patterson. Second Edition, with Notes and References to additional authorities by Robert P. Reeder. Philadelphia: T. & J. W. Johnson & Co. 1904. pp. xli, 347. 8vo.

The powers delegated by the states to the federal government have always been the subject of much dispute. On the one hand the states have sought jealously to guard their rights; on the other the emergencies growing out of the increasing complexity of our civilization have led to a more liberal interpretation of the powers conferred upon the United States by the Constitution. The questions of law which accordingly arise from the relation of the states to the United States are of supreme importance, since on their correct determination depends the continuance of our present form of government. Where questions of this sort are concerned, a work which merely enables the lawyer readily to find the cases on the points on which he is interested may be of more value than the most elaborate treatise. At any rate, it is in the former respect that the present volume is likely to prove useful, for the text of the book is short, and little space is given to independent theoretical discussion. The author contents himself with clear and succinct statements of the law as laid down in the Supreme Court decisions, reasons being usually supplied by quotations from the opinion of the court.

The excellent arrangement of the first edition, which was published in 1888, has not been departed from. The first chapter discusses broadly the relation of the states and territories to the federal government. The powers of the United States, taxation, and the regulation of commerce are then treated. Chapter V deals with the impairment of the obligation of contracts, Chapter X with the judicial power, and in the last chapter are briefly discussed the results of federal

supremacy and the importance of preserving the rights both of the United States and of the States. The text is somewhat fuller than that of the first edition, and a considerable number of cases has been added.

A COLLECTION OF PROBLEMS AND EXERCISES IN THE CIVIL AND COMMERCIAL LAW OF EGYPT. By Maurice Sheldon Amos and Pierre Arminjon. Cairo: National Printing Department. 1904. pp. 145. 8vo.

Since the law of Egypt is derived from the Code Napoleon and the traditions of Continental Europe, it is but natural that legal instruction in that country should follow in general the methods pursued in France and other Continental countries, and should thus be confined almost wholly to a consideration by students of abstract principles without particular regard to concrete problems. While, owing to the overshadowing importance of the Code Napoleon in the civil law and the lack of binding force possessed by decisions of courts, it is perhaps expecting too much to look for the adoption in civil code countries of our own case system of legal study, yet it is certainly not unreasonable in us to hope that, in some form at least, the inductive, as opposed to the deductive method, will find an increasing use in all legal education. The present collection of problems and exercises seems to indicate that in Egypt at least such a change is coming about. The problems presented cover the entire range of the law, and seem calculated to stimulate the student to enthusiastic effort. The exercises are in many cases difficult, reminding one forcibly of questions put in this country at law school and bar examinations. Occasional foot-notes with reference to the code and to decided cases put the students on the track of the solution of the more difficult problems. As a supplement to regular instruction or to private study the collection ought to prove a success. At any rate the student who is able at the end of his law course to answer readily all the two hundred and sixty-five questions contained in the collection may surely be regarded as a fair master of Egyptian law.

SELECTED CASES ON THE LAW OF BAILMENTS AND CARRIERS, including the Quasi-Bailment relations of Carriers of Passengers and Telegraph and Telephone Companies as Carriers. By Edwin C. Goddard. Chicago: Callaghan & Company. 1904. pp. xiii, 742. 8vo.

A TREATISE ON THE LAW OF WILLS, including also gifts *causa mortis* and a Summary of the Law of Descent, Distribution, and Administration. By John R. Rood. Chicago: Callaghan & Company. 1904. pp. lxvi, 635. 8vo.

ENGLISCHES STAATSRRECHT mit Berücksichtigung der für Schottland und Irland geltenden Sonderheiten. Von Julius Hatschek. 1 Band: Die Verfassung. Tübingen: J. C. B. Mohr (Paul Siebeck). 1905. pp. xii, 669. 4to.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XVIII. For the year 1904. Borough Customs. Volume I. Edited by Mary Bateson. London: Bernard Quaritch. 1904. pp. lix, 356. 4to.

THE LAW OF FOREIGN CORPORATIONS and Taxation of Corporations, both Foreign and Domestic. By Joseph Henry Beale, Jr. Boston: William J. Nagel. 1904. pp. xxvi, 1149. 8vo.

HANDBOOK OF JURISDICTIONS and Procedure in United States Courts. By Robert M. Hughes. St. Paul, Minn.: West Publishing Co. 1904. pp. xviii, 634. 8vo.

OSGOODE HALL. Reminiscences of the Bench and Bar. By James Cleland Hamilton, with illustrations. Toronto: The Carswell Company, Limited. 1904. pp. xii, 196. 4to.

OUTLINES OF THE LAW OF BAILMENTS AND CARRIERS. By Edwin C. Goddard. Chicago: Callaghan & Company. 1904. pp. xiv, 250. 8vo.

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JURISDICTION IN ACTIONS BETWEEN FOREIGNERS.¹

SHOULD the courts of a country take jurisdiction of suits between foreigners just as they would of cases of the same nature arising between their own citizens? If a foreigner sues another foreigner in a court of a third state, may the defendant refuse to submit to the jurisdiction of the tribunal on the simple ground that neither he nor his adversary is a subject of the state in which it sits? And if the defendant is silent or expressly submits to the jurisdiction of the court, may the judge for that same reason refuse to hear the case?

This is a question of much practical importance. In an age like the present the development of international intercourse leads a continually increasing number of people to establish themselves for longer or shorter periods, sometimes for their whole lives, outside of their native countries. It is necessary that the standing of these people be clearly determined; that they know whether the courts are completely open to them, and whether they are assured of getting their rights in them, even against another foreigner.

As in certain aspects this question, although apparently one wholly between private parties, really involves the basic principles of the law of nations, it has seemed to me worthy the attention of the learned readers of the HARVARD LAW REVIEW, and I thought I could not better comply with the very gracious request of the editor than to take it as the subject of the article which he was pleased to ask from me.

¹ Translated by Mr. William C. Gray.

I.

I will say, first, that there is an apparently irreconcilable conflict regarding this subject between French and English-American decisions. By the common law in England and in America, of which judicial decisions are the great source, it is hardly recognized. The authors of the best repute scarcely mention it,¹ and from the small number of cases to which they refer, it can be seen that the governing principle is well established. This is the rule that the native and the foreigner are equal. Whenever by the rules as to jurisdiction within the state an English or American judge is obliged to take cognizance of a suit interesting any person, there is no reason to ask if this person is a foreigner or a native, for the rule is the same in either case. Therefore the defendant would not try to elude possible judgment by pleading his position as a foreigner; nor could the judge avoid taking jurisdiction by declaring that the parties were subjects of a foreign state.²

This great rule is perfectly well known to American jurists, and it is needless to speak of it further. In France it is quite otherwise. The Civil Code, which has regulated³ the jurisdiction of French tribunals in suits between Frenchmen and foreigners (and has done so in a very partial spirit), has said nothing about their jurisdiction in suits between foreigners. It is therefore with us, as in England and America, left to decision; but this power has been used quite differently. After some years of hesitation, when there was hope that our tribunals would be freely opened, the French courts, the Court of Cassation leading, took the position that they are on principle without jurisdiction in suits between foreigners.⁴ Since then the principle has been steadily maintained by them, and a searcher might count by hundreds the decisions of every rank unweariedly affirming the lack of jurisdiction of French courts in such suits. It is, to be sure, a peculiar lack of jurisdiction, hard to include in the ordinary classifica-

¹ Dicey, *Conflict of Laws*, Rule 41 and Comment. American notes (4) p. 231.

² But, on the other hand, the English citizenship of the parties can give the English courts jurisdiction, although they would not have it by the other circumstances of the case. This at least can be inferred from the case of *Scott v. Seymour*, 1 H. & C. 219.

³ Arts. 14, 15, 16.

⁴ 4 Phillimore, *Int. Law* 726, describes the principle of our jurisprudence as a caricature of the idea of the independence of states.

tions. The defendant has the right to set it up and to compel the judge to give up the case, but he must make his objection before the trial is actually begun, *in limine litio*, otherwise he must go on and defend the suit. The judge may also refuse to hear the case, but he is not obliged to do so. If he prefer to retain it, there is nothing irregular, and a decision so given between two foreigners will not be disturbed by the Court of Cassation. Such, then, is the rule which is constantly applied with us.

It is not enough in law to lay down a principle to insure its observance; the principle must be one that suits the demands of life, for law is a social science whose rules acquire value only by strict conformity to the needs of society. By having failed to recognize this great truth, our jurisprudence has condemned itself here to furnish the pleasing and rather ridiculous spectacle of an architect tearing down piece by piece the building he has constructed. The principle once laid down, our judges have not wished to deny it, but they have narrowed it by making so many exceptions that its practical application has been reduced to a very small compass. That is not due to chance, and no one should be astonished. Whenever an international institution is directly contrary to the needs of international intercourse it has to suffer a number of exceptions before it completely disappears. So it was with the *droit d'aubaine*. In the eighteenth century it received so many limitations that the privilege became the regular rule, and the old incapacity to receive and to transmit, the very infrequent exception.

Let us see, therefore, how this principle has been narrowed. Certain states which have treaties with France assuring the citizens of each country free access to the courts of the other escape its application; so do foreigners who have the "authorized domicile" in France mentioned in Article 13 of the Civil Code. Besides, and most important, many matters of legal inquiry are placed by our decisions beyond the operation of this rule. In suits as to immovables, actions in which public order is concerned, and questions involving commercial obligations or provisional measures, French courts consider themselves competent to judge between foreigners. Sometimes, indeed, the mere circumstances of the case seem to them a sufficient reason for not applying the principle. Thus an incidental question between two foreigners is within the jurisdiction of the French courts when

it is connected with a principal action regularly before them; and, again, the principle yields when the plaintiff can prove that there is no foreign tribunal before which the action can be brought.

There are still other exceptions of less importance. Those just cited show sufficiently the breaches made in the principle and the slight importance of its application. It is interesting to note that of these numerous exceptions only one, the first, comes from a positive written law. All the others have no such support. Springing from the free action of the judges, they witness the impossibility they found of applying their general law to most cases.

II.

Of these two principles — one adopted in the common law countries and the other in France — which is the better? Unquestionably the former. English-American jurisprudence has had the rare merit of adopting at the outset and thenceforward strictly following the only rule which satisfies justice and the only one which meets the needs of international commerce. And that certainly ought not to be forgotten. We on the Continent do not hesitate to prefer greatly our law and decisions to the ancient customs which have kept their authority in English-American law. Whatever may be the merit of this claim, we ought at least to acknowledge that in the international administration of justice our laws, and especially those of France, are much inferior to that system which we do not hesitate to describe as backward.

What, in fact, is demanded by justice and this international intercourse which has become an indispensable factor in the existence of nations? It is that justice be freely accessible to foreigners; that they shall enjoy in this respect perfect equality with natives; in short, that a man's status as a foreigner shall never cause the failure of a suit brought before the proper judge, or be a means of his escaping a responsibility which he has properly incurred. Only in this way can the traveler, the merchant, the foreigner settled in another country, enjoy security of person and property, and make use without apprehension of the benefits of international intercourse. The rigorous exaction from the foreigner of sureties to guarantee his opponent against any possible wrong the suit may do him is neither difficult to understand nor entirely unjust. A foreigner, with no ties in the country where he brings his action, might by flight escape the obligations

which a reckless suit sometimes causes. That is a danger a legislator may rightly think it well to guard against; but one cannot justify or even understand the exclusion of a foreigner, merely because he is a foreigner, from the courts of justice before which the ordinary rules of jurisdiction would authorize him to appear.

This idea is strengthened if one examines the reasons on which the French courts found their refusal to take cognizance of suits between foreigners. These reasons, repeated a hundred times in the decrees, simmer down to two statements of greatly varying importance. The French courts, they say, were not established to dispense justice to foreigners, and they add that this extension of their jurisdiction would have the inconvenience of requiring them to apply foreign laws. I would be quite willing to call this second reason childishness. French courts not to apply foreign laws? They were established to declare the law; and if the principles of law demand that foreign laws be applied, one cannot see upon what pretext they would base their refusal. Moreover, it is possible that foreign law may be applicable to a suit between Frenchmen; it often is in disputes between Frenchmen and foreigners. It would not occur to the French judge to invoke this pretext to avoid deciding such suits. In what respect is it weightier when it is a question of suits between foreigners?

This so-called reason bears witness to the diffidence which our jurisprudence professes in regard to foreign laws; and we recall that this same mistrust causes our judges to regard every question of the application of foreign law as a pure question of fact whenever this application is not commanded by some French statute.

The first reason given is of very different value, and brings us to the heart of our subject.

The French courts were established to judge Frenchmen and not foreigners. That is an important statement, which deserves closer examination. Let us notice, first, that it rests on no statute. True, the law which established our Court of Cassation declared that the object of its institution was to insure unity in the interpretation of French law, but that does not at all mean that the French courts have not the duty of dispensing justice to foreigners. The courts, therefore, are not obliged to take this position, and I shall try to demonstrate that it is not sustainable, being contrary to the first duties of the state.

No one doubts that the function of dispensing justice is one of

the essential attributes of the state. Indeed, there is no interest of society greater than that. The *sum cuique tribuere* is the first condition of order and of peaceful society. The state, natural guardian of the rights of the individual and of those of society, could not under any pretext avoid this duty. And one will notice that, for order to exist, for the maintenance of the peace of society, it is not enough that exact justice be done to a certain number of men; it must be done to all under penalty of rendering social relations insecure. This security, this order, this peace, the state owes to foreigners as well as to its own citizens. By admitting them to its territory, by permitting them to pass through or to live within its borders, it tacitly engages to see to the security of their interests. But what security will there be if aliens cannot appeal to the courts on the same terms as others, and must be resigned to living outside the law, to being deprived of the means of obtaining its protection?¹

It may be maintained, perhaps, that our decisions, by excepting the cases in which public order is concerned, meet this need and pay the debt of the state to the foreigner. To believe that would be pure delusion. The only cases which concern public order are those where it is important to the state that foreigners living within the territory may be brought before its tribunals or, on the other hand, make their complaints to them. Jurisdiction in criminal cases is the best example that can be given of such cases. It is evidently not to be admitted that a foreigner shall escape penal or civil responsibility for his crimes on the ground that, as his victim is another foreigner, the tribunals of the place cannot take cognizance of their disputes. Public order would be too evidently injured by such a decision; it would hardly be less injured if there were refused to the victim of a criminal or even a civil offense the power of making complaint to the courts of the state in whose territory the wrongful act was committed. But how many other cases present themselves where the refusal of the right of action to one foreigner in a contest with another results in a veritable denial of justice. In most cases men from a distance and long established in a country will find it impossible to secure the rights they claim if the local courts are not open to them. Must they

¹ We cannot therefore agree with Story (Conflict of Laws § 542) when he declares that this is a matter of internal policy and concerns no principle of international law. It is true that in § 557 *in fine* the same author uses appreciably different language.

to get justice travel hundreds or thousands of miles, leave their homes, and interrupt their business to scour the world in search of a judge with jurisdiction? They will find it easier to abandon their rights, but will think rightly that there is no true security for them in a country where they cannot obtain justice, and that in this respect they do not enjoy the advantages of international intercourse.

Considerations of another kind lead to the same result. In every civilized country aliens have so many rights that, putting aside political rights, one may say that their condition is not perceptibly inferior to that of citizens. In France, where our jurisprudence has remained faithful to the ancient distinction of the law of nations common to foreigners and to citizens and the civil law peculiar to the latter, the former of these categories includes the more numerous and the most important rights. Foreigners may acquire family rights (except that of adoption, little practised nowadays), become owners of everything in trade, contract, — in a word, are capable of almost all the acts of civil life. True, the legislation which will govern them will sometimes be foreign, but this circumstance, which may compel the exercise of greater care, cannot in the least deprive them of the enjoyment of the rights which French law grants them. But what does the legislature do when it allows a person to enjoy a certain right? It promises him that it will see to the protection of his right when he has acquired it by conforming to the conditions of the law. The promise of the legislature can have no other meaning; if it has not that, it has none at all. It is seen, then, that the granting of certain rights to foreigners implies an obligation on the legislature which has done it to give its protection to these rights in order to oblige everybody to respect them. But it is the courts that give the promised protection of the rights of private parties. To acknowledge a person's right and refuse the courts the power to protect it, is clearly inconsistent. It is taking away with one hand what the other gives.

That the matter has been looked at otherwise and our decisions have made this mistake, is the fault of the inexact idea our courts have of the right to appeal to a court. They consider it a distinct right, a civil right which they grant or refuse at pleasure. The truth is quite the contrary. To give the word "right" a positive meaning, one must understand that any right whatever includes the power to appeal to the courts to enforce respect for

it. The power to go to law is not a distinct right which can be denied to anyone without compromising the existence of all his rights. It is one aspect of these rights, or, more exactly, a phase of their existence, for any right may on occasion lead to a lawsuit, and unless suit is possible, there is only an apparent right. Carrying to its logical consequences the idea that the French tribunals were established for Frenchmen and not for foreigners would put the latter completely outside the law, and make their condition inferior to that of the slave of ancient times, who could sometimes, at least, claim against his master the protection of the magistrate.

The numerous modifications of this principle made by our decisions have enabled them to escape such absurdities, but the fact that these absurdities are its logical result is enough to condemn it.

Numerous treaties, commercial treaties especially, have clauses in regard to the rights which the subjects of each contracting party shall enjoy when in the other's country. A promise of free access to the courts is almost always mentioned among these rights. Thus diplomacy, more enlightened on this point than our domestic practice, shows that in its opinion there are no real rights other than those which may be enforced by a prompt appeal to the courts. Our jurisprudence has committed the grave mistake of forgetting this.

Thus, not only is English-American jurisprudence decidedly superior in this respect to that of France, but it must be said that one represents truth, the other error. It is a double error, as we have seen,—a fundamental error as to the duty of the state toward the foreigner, whose legal personality is respected only so far as the local tribunals are open to him on the same terms that they are to everybody else, and an additional error in interpretation of law, as it cannot be admitted that the granting of any right whatever to a foreigner does not carry with it the jurisdiction of the courts of the state, with power to give such right the public protection which is its strength. The international rule, the only just one, the only admissible one, is therefore that in every country there ought to be only one law as to jurisdiction, the same for foreigners and for natives. But what shall that law be, and how should it be defined to avoid giving rise to hopeless conflicts between states? The examination of this question will be the object of the third part of this article.

III.

If one reflects on the social function of the law, it appears that its aim is to assure to everybody as certain and as prompt protection of his legitimate interests as possible. A good international law as to jurisdiction ought to be brought forth by these needs, which are certainly more pressing in that field than within a nation. For if it is vexatious in the latter case for a pleader to be in doubt as to the judge to take jurisdiction of his case, it is more disastrous still in international relations, where he might have to seek the world over for a law that would seem to be fleeing from him. To assure international justice there must be a tribunal of competent jurisdiction for every case that may arise, and it is scarcely necessary to add that this tribunal ought to be pointed out by rules so clear that in general no doubt will exist to confuse and delay a suitor from the outset.

It is also necessary that there should be but one competent tribunal for a case, for having several results in conflict of decision and confusion as to rights. It clearly appears that such a result can be reached only by an international understanding. A state could not admit that its own tribunals ought to refuse to consider a case simply because it has been or is now before a foreign court. This is what we mean by saying that the objection of *lis pendens* does not extend from one nation to another. The agreement desired can be reached only as the different states adopt the same principles in regard to jurisdiction.

These fundamental needs are not the only ones to consider. It is necessary also, as a recent writer has especially well brought out,¹ that the action of the law be effective. And for this purpose, of several tribunals equally qualified, that one should be given jurisdiction which can most easily give its judgment suitable enforcement. In addition, regard must be had to the accessibility of the court to those amenable to it, so that they shall not be prevented by practical difficulties from taking their claims before the proper judge, and may without difficulty bring forward the evidence which will govern his decision.

With these premises we can continue our study and ask whether the English-American or the French system is nearer a general

¹ Dicey, *Conflict of Laws*, General Principle III., Intr. p. 38 *et seq.*

type, capable of serving as a rule to determine jurisdiction in international matters.

There is little to say about French jurisprudence in this matter, for it is enough that a foreigner be a party to the action to cause exceptional rules as to jurisdiction to be applied. The French plaintiff always has the right¹ to bring his foreign opponent before the French tribunals, and the foreigner suing a Frenchman can, according to our law,² and should, according to the interpretation put on it by our judges, summon the defendant before them. In suits between foreigners, the subject of this article, our question cannot arise, since on principle these suits are outside the jurisdiction. When, however, our judges make an exception and consent to hear such suits, they follow the rules which are in force as to natives. Thus what in England is the rule is with us only the exception, — a very narrow exception, in truth, for it happens that many of the suits between aliens which are before our courts are governed by special and rather extraordinary rules as to jurisdiction. This is, for example, the case with suits governed by the Franco-Swiss Treaty of June 15, 1869, a treaty noted with us for the great difficulties of interpretation to which it has given rise.

Finally, our domestic laws are simple enough. They rest, as is well known, on two great rules of Roman origin, — the jurisdiction of the forum of the domicile in personal suits and actions as to movables, and the jurisdiction (so natural that one might call it necessary) of the tribunal of the *situs* in actions as to immovables. For the convenience of commerce merchants may lay their cases before the judge of a place where a promise was made or goods delivered, and of the place where payment should have been made.³ In civil matters Article 59 authorizes a certain number of exceptions to the principles laid down. These apply to circumstances where application of the principles is impossible, as when several defendants in one action have no common domicile, or to cases where it is especially convenient to have the same class of matters brought before one judge. Matters of inheritance, of bankruptcy, of suretyship, make up this class. Finally, parties may by appointing their domicile agree on a certain tribunal before which to bring their disputes.

¹ Art. 14, Civil Code.

² Art. 15.

³ Art. 420, Code of Civil Procedure.

Artificial persons (associations invested with a legal personality) are subject on principle to the same rules of jurisdiction as natural persons.

The English-American system (*fassent les Immortels conducteurs de ma langue que je ne dise rien qui puisse être repris*) seems a little more complicated. English jurists put on an equality principles which have very different weight. Thus the questions of jurisdiction over divorce, validity of marriage and legitimacy, and of bankruptcy, succession, and administration are of a rather exceptional character. The nature of the interests demands the application of special rules of jurisdiction, either because it is convenient that a single judge have before him all the suits relative to a single legal matter (succession, bankruptcy), or because a certain judge may be better placed than others to appreciate the weight of the respective claims of the parties. Above these rules of an exceptional nature there are some general principles. They are the jurisdiction of the *forum rei sitæ* over immovables,¹ and the rule laid down for actions *in personam*. Let us dwell on this latter. Actions *in personam* are the most common of all, and in dealing with them the English-American practice differs most from the ideas held on the Continent, especially in France.

Jurisdiction of English courts of justice over personal actions depends on rules quite different from those which governed Roman, and still control French law. More than that, the very spirit of these rules and the manner of their construction belong to systems very far apart. In France (as formerly in Rome) one asks first if the French courts have jurisdiction; this primary question out of the way, the law gives the complainant a way of summoning his opponent before the tribunal which is to judge him. In England and in America the process is reversed; one seeks first to find out if the writ of summons (*l'assignation*) can be legally delivered to the person wanted (personal service) or something equivalent done (substituted service).² Then, once it is established that the writ can be regularly served, the jurisdiction of the English courts naturally follows. In France we should call that putting the cart before the horse.

The two great traditional rules of English law in regard to jurisdiction are thus described: Whenever the defendant, even

¹ Dicey, Conflict of Laws, Rule 43.

² When in an action *in personam* the rule as to the legal service of a writ defines the limits of the court's jurisdiction. Dicey 234.

if only passing through the country, is found on English soil, so that in consequence the writ of summons can be personally served, the English courts can take cognizance of the personal actions which concern him. And conversely, in principle at least (for this second rule is far from being as absolute as the first¹), whenever the writ cannot be delivered to the defendant personally, because he is not on English soil, the English courts have no jurisdiction over him. We do not think these rules could form the basis of a good international system of jurisdiction. They represent for us the law of a period when the working of justice was uncertain, its means of action few and limited, and when the first condition of obtaining the satisfaction demanded from a debtor was the ability to put your hand on his collar. At that same time the magistrates of our *parlements* were obliged to leave their seats to watch personally over the execution of their decrees. It is common knowledge that this was the origin of the judicial vacations. Moreover, it must be noticed that in those old days the arrest of the body was the common right, so that the presence of the debtor at the bar of the tribunal was usually a sufficient guarantee to the creditor of the effective execution of his judgment. Times have changed, however. To eyes not accustomed to these things by the daily course of practice such principles seem very extraordinary, and in fact the presence of the debtor cannot always be a good reason for passing judgment upon him. If this presence is purely accidental, the judgment thus rendered will perhaps not be consistent with the interest of the creditor, of the debtor, or even of justice. The French rule of jurisdiction—the tribunal of the domicile—is certainly better. It is the one which best regards the security of the defendant, which secures the judge best fitted to decide the suit, and in the greatest number of cases insures the effectiveness of the judgment. In a certain sense English jurisprudence recognizes the superiority of this last principle, and uses it largely in matters of divorce and legitimacy. Moreover, it does not regard the mere presence of the defendant within the territory of the court as an international principle of jurisdiction, and when in England the question is one, not of deciding a case, but of giving effect to a foreign judgment, the judges decide the jurisdiction of that foreign court by con-

¹ Cf. Dicey, *Conflict of Laws*, Rule 45; and 4 Phillimore, *International Law* 724.

sidering not merely the presence of the defendant, but other less accidental circumstances as well. Domicile of the defendant within the territorial jurisdiction of the court is one of these.

The jurisdiction of the court of the place over immovables and of that of the domicile over personal actions and movables seems the principle on which the nations might come to an agreement. Adding to these two chief rules of jurisdiction that of the forum chosen by the parties when they have beforehand designated their judge, there would seem to be a simple and satisfactory system of general principles. Of these three rules, the first and the last are everywhere recognized; between French and English-American jurisprudence there is a difference only as to the second. One may think there is nothing insuperable in this difference.

But this is not enough. We know that practical needs in all countries lead the legislatures to decree certain exceptions to the rules of jurisdiction they have adopted. In this field likewise an agreement is desirable; upon what basis could it be put? It seems that the desired unity can be obtained only by reducing the exceptions to indispensable cases. It might still happen, therefore, that in the same country the rules of jurisdiction would not be identical for suits between natives and those in which foreigners were concerned. That would be a real inconvenience, but a much smaller one than results from a multiplicity of competent jurisdictions or from the lack of them.

The study of English decisions seems fitted to teach us the number and the good sense of the exceptions to be admitted. We know already that a writ of summons cannot be delivered to a person who is out of the territorial limits of the court. This principle, however, has some modifications. There is a certain number of cases in which the judge may authorize the plaintiff to serve process out of the jurisdiction. It is almost useless to remark that the judge, whose power to do this is discretionary, will authorize such exceptional procedure only when his jurisdiction rests upon some especially serious considerations. Therefore the list of cases in which service out of the jurisdiction is permitted is of a kind to show us what exceptions it would be well to make to our general rules.

But we also find in English decisions a means of attaining greater precision and of setting up a sort of counter-proof; that is the examination of the cases which consider foreign courts to have jurisdiction and order the execution of their judgments. If

we enumerate the cases of service out of the jurisdiction as shown by the Rules of the Supreme Court of 1883, we find that they relate to the following actions: actions regarding immovables situated within the territory over which there is jurisdiction or against persons domiciled or ordinarily residing there; actions concerning the succession to the property of one dying domiciled within the territorial jurisdiction; actions arising from a contract that should be executed there, or intended to prevent or remedy a tort in the same place; actions naturally joined to another against a defendant who has been regularly served. This is our first criterion. Let us now look at the second. Here the task is harder, for there are no well settled rules in English law on this point. Westlake even shows with suitable proof that the older cases rested on no fixed rule, and confined themselves to following the suggestions of natural justice.¹ More recent decisions are little more distinct and are not easy to analyze. The most certain point, however, is that one who has voluntarily accepted a foreign jurisdiction will be unwelcome if he disputes it before an English court. This voluntary submission may appear in several ways. It sometimes results from a contract made between the parties, sometimes from the fact that the loser himself began the action in a foreign court, and most often from the fact that the defendant in such a suit appeared without objection. One may also say that the courts of the country of which the defeated party is a subject or resident have jurisdiction.² But this word "resident," borrowed from the celebrated case of *Schibsby v. Westenholz*, gives rise to difficulty. Does it mean the simple fact of presence on the soil, and is this presence, which would be enough, as we have seen, to give jurisdiction to an English court, enough to make certain and effective in England the jurisdiction of a foreign court? Dicey inclines to the opinion that it is; Westlake is more doubtful.³ If I may be permitted to express an opinion, I will suggest that the language of the judge applies better to a residence equivalent to domicile than to a mere sojourn, for he speaks of a residence procuring to him who proves it the benefit of the laws of the country or imposing on him the duty of a temporary allegiance to its sovereign. Does not this apply solely to domiciled foreigners? There can be seen in the most recent English decisions a certain

¹ Westlake, *Private International Law* 344.

² See the opinion of Fry, J., in *Roussillon v. Roussillon*, Dicey, *loc. cit.* 372.

³ Dicey, *loc. cit.* 374; Westlake, *loc. cit.* 344.

tendency to take account, in considering the jurisdiction of foreign courts, of the *forum contractus celebrati*, especially if there is joined with it some other favorable circumstance, such as the fact that the place of making a contract is also that of its execution.¹ If an idea of strict reciprocity always enlightened the minds of jurists and magistrates, the cases in which they recognize the jurisdiction of others would be exactly the same as the ones in which they claim it themselves. It has not been so, however, and English jurisprudence shows itself much more positive in asserting its own jurisdiction than in recognizing that of others. It would be wrong to reproach it for this, however. It is a failing common to all judges of all countries. Yet it is certain that we ought to hold as best established the cases of jurisdiction having both this domestic and foreign recognition. It is only in these cases that the need is met as adequately as it would be in special courts. May there be other cases? Perhaps, at least so far as a true necessity seems to justify them.²

We will confine ourselves to these very general hints, not pretending to exhaust a subject large enough to fill volumes. If a lesson can be drawn from these few pages, it is simply this: the French and English-American laws, so absolutely opposed in this matter of jurisdiction, would find every advantage in coming to an understanding and uniting on a general law which would be a satisfactory compromise. Is this change possible; or would it clash too strongly with the individuality of the states concerned? These questions I leave to those more able than I. The hydrographers inform us that the British Channel is not a very deep body of water; perhaps it would be possible to build this bridge between the two countries while waiting for another. And it would be of great importance. Until the world can be brought to accept a single system of private international law—and in spite of the progress in that direction of late years it seems that a very long time will pass before that ideal will be attained—the laws applied to any subject will vary with the tribunal before which it comes. The establishment of clear-cut laws in regard to jurisdiction, easily

¹ Westlake, *loc. cit.* 345.

² It will be noticed that these two exceptions to the general rules as to jurisdiction are accepted in the Franco-Belgian treaty of July 8, 1899. This treaty, the provisions of which might usefully be consulted when considering the drawing up of an agreement as to jurisdiction, establishes also special courts in matters of guardianship, succession, and bankruptcy. On these special points, again, it is probable that an agreement might be had.

understood and universally respected, would allow everyone to know by what law he will be judged. The lack of certainty in the law would be so much diminished. Is not lessening the uncertainty of law one of the most signal services we can render to private interests?

A. Pillet.

UNIVERSITY OF PARIS, February 6, 1905.

TIDE-FLOWED LANDS AND RIPARIAN RIGHTS IN THE UNITED STATES.

THE United States Supreme Court has frequently called attention to the fact that titles to the shore and shore rights are matters of local state law in which the court must follow the local decisions, and some of the best considered cases in the several state courts also refer to their own law as different from that of other states.¹ But nevertheless it does not seem to be generally understood that there are two well defined theories of riparian rights and the state's title to tide-flowed lands in this country, and much less that these two theories have distinctive historical origins.

The first of these is frequently referred to in the reports of the United States Supreme Court and other cases as the common law of the United States upon these subjects. It is best and most fully exemplified in the law of Connecticut, where the riparian owner has had the exclusive right to wharf and fill out in front of his upland since early colonial days, and it is referred to as having grown up by custom.² This exclusive right grows out of the location of the upland which furnishes the only right of access to the shore. But the right of access is not a mere technical access, as we shall see it is in New York, nor is it limited to an access to a technical "channel" at low-water mark, as apparently in Massachusetts, but it is the substantial and useful right to reach the deep channel used in practical navigation.³ In common with all modern cases, the Connecticut court holds that the technical fee below high-water mark is in the state, and the right of the riparian owner is therefore stated to be in the nature of a franchise. But whatever may be its proper definition, this riparian right is a

¹ See *Shively v. Bowlby*, 152 U. S. 1, 26, 57; *Sage v. New York*, 154 N. Y. 61, 78; *Gould v. Hudson River R. Co.*, 6 N. Y. 522, 539; *Boston v. Richardson*, 105 Mass. at p. 361.

² *Swift's System* 341-342 (1795). In *East Haven v. Hemingway*, 7 Conn. at p. 203, the court say: "It stands on the same ground of general usage which is at the foundation of the Common Law."

³ *Prior v. Swartz*, 62 Conn. 132. In *Illinois Cent. R. Co. v. People of Illinois*, 146 U. S. at pp. 449-450 the Supreme Court also placed the limit of the riparian owner's right at practical navigability. See also same case on further appeal, 184 U. S. 77.

valuable right of property of which the owner cannot be deprived without compensation,¹ and early became so nearly a title to tide-flowed flats that the owner could convey them separately from his upland. Finally, the title of the state is so technical, and held so fully for the common public benefit, that the establishment of harbor lines "is only the exercise of the police or supervisory power vested in the legislature, — the power to enact such laws as they deem reasonable and necessary for the regulation of the use by riparian proprietors of their qualified right in the soil of the shore,"² and in *Prior v. Swartz* it was held that the owner of a wharf could dredge a channel in front of it to navigable water, although he thereby destroyed oyster beds planted under authority of the state.³

The second theory is most readily stated from the law of New York. There the state owns the soil below high-water mark in such a sense that it can be granted away at pleasure to either the upland owner or to any stranger, and if an owner of the upland builds a wharf without a special grant of the soil from the state, it is subject to the rightful power of the state to destroy it or its value without making compensation. For many years after the case of *Gould v. Hudson River Co.*,⁴ decided in 1852, it was supposed that the title of the state was unqualified and that the riparian owner had absolutely no rights, not even that of access to tide-water. More recent cases have slightly modified this view, and established the principle that the state holds its title in trust for the promotion and protection of commerce and navigation,

¹ *Farist Steel Co. v. Bridgeport*, 60 Conn. 278.

Accord: *Yates v. Milwaukee*, 10 Wall. (U. S.) 497, 503-504; *Chapman v. Oshkosh*, etc., R. R., 33 Wis. 629, 636-638 (River); *Delaplacine v. Chicago*, etc., R. R., 42 Wis. 214, 226-233 (Lake); *Priewe v. Wisconsin, etc., Society*, 93 Wis. 534, 549-552; *Brisbine v. St. Paul*, etc., R. R., 23 Minn. 114, 129-130; *Carli v. Stillwater*, etc., Ry. Co., 28 Minn. 373, 380; *Union Depot Co. v. Brunswick*, 31 Minn. 297, 300-303; *Myers v. City of St. Louis*, 82 Mo. 367, 378.

See also Mr. Justice Potter in *Steam-Engine Co. v. Steam Ship Co.*, 12 R. I. at p. 367.

² *State v. Sargent*, 45 Conn. 358. The Connecticut view that harbor lines are an exercise of the police power for the preservation of navigation is also held by the Supreme Court of the United States in *Illinois Cent. R. Co. v. People of Illinois*, 146 U. S. at p. 459.

³ In accord with the law of Connecticut are: *Clement v. Burns*, 43 N. H. 609; *Concord Co. v. Robertson*, 66 N. H. 1; *Hanford v. St. Paul Ry. Co.*, 43 Min. 104; *Norfolk City v. Cooke*, 27 Gratt. (Va.) 438; *Gough v. Bell*, 22 N. J. Law 441, and *Arnold v. Mundy*, 6 N. J. Law 1.

⁴ 6 N. Y. 522.

and, of course, its grantees can take no better title than it has itself. Within the trust, however, the title of the state is still so superior to any rights of the riparian owner that the latter may be deprived of all riparian rights, including his right of access to tide-water, without compensation, provided the state and its grantee do so by improvements for the benefit of commerce. But if an improvement is for any other purpose, although a public one, the riparian owner is entitled to compensation. As it now stands, however, it is strongly intimated that even in this case he can collect only nominal damages, because the only access to which he is entitled is by such boats as could reach his land at high-water mark, in place of the very substantial damages given by modern English authorities in similar cases.¹

The law of New Jersey as now established and that of Massachusetts are the same as New York, except that in both the title is an absolute commercial title subject to no trust for the public, and except that in Massachusetts by force of the colonial ordinance of 1647 the state's title stops at low-water mark or the 100-rod line from high-water mark. This ordinance gave the riparian owners a title between high and low-water marks, but the title was later held, in *Commonwealth v. Alger*,² to be subject to the police power of the state for the benefit of navigation to lay a harbor line between high and low water and thereby limit the use of the shore by such owner. The title of the riparian owner in Massachusetts between high and low water is, therefore, now in substance the same as that of a riparian owner in Connecticut.

It would seem that the mere statement of the two theories would show that they were necessarily antagonistic,—that there could not be a right of property in the owner of the upland of which he could not be deprived without compensation, and at the same time such a title in the state that the privilege of the upland owner to

¹ The following cases sufficiently trace and explain the law of New York: *Lansing v. Smith*, 4 Wend. (N. Y.) 9; *People v. N. Y. & S. I. F. Co.*, 68 N. Y. 71; *Sage v. New York*, 154 N. Y. 61; *The Matter of the City of New York*, 168 N. Y. 134; s. c. *sub nom.* *Matter of Boos*, 56 L. R. A. 500.

For English cases giving substantial damages for loss of access, see *Duke of Buccleugh v. Metropolitan Board*, L. R. 5 H. L. 418; *Atty.-General v. Wemys*, 13 App. Cas. 192; *North Shore Ry. Co. v. Prior*, 14 App. Cas. 612.

² The three Pacific coast states and probably some others have also adopted the law of New York. *Eisenbach v. Hatfield*, 2 Wash. 234; *Bowlby v. Shively*, 22 Or. 410.

See the legislation referred to in *People v. Williams*, 64 Cal. 498, and in *Webber v. Commissioners*, 18 Wall. (U. S.) 57.

wharf out is a mere revocable license. But very naturally in those states holding to the Connecticut theory the cases usually arise between private parties, while in those following New York the controversy is commonly between the state or its grantee on the one hand and the owner of the upland on the other. Hence it is not always perceived that the cases in the two sets of states are not different phases of one law common to both, and the courts of New Jersey have actually adopted the view that their earlier cases decided between private parties were not inconsistent with a commercially salable title by the state when the latter was ready to assert it. A comparison of the dissenting and majority opinions, in the two cases of *Martin v. Waddell*¹ and *Illinois Central R. R. Co. v. People of Illinois*² will also fully demonstrate that the theories are irreconcilable.

It will be seen however that the two theories agree in one point, that the incidents of the enjoyment of the soil below high water is in its nature private property. No one denies that the state as the conservator of public interests may control, improve, and regulate the use of navigable waters for the benefit of the people at large, — in other words, that the state has the *jus publicum* of Lord Hale and other writers. But the question whether the state in addition to its interest for the people at large has retained or can now seize upon property in the shore which necessarily has from its location the incidents of private commercial property, and make a profit for itself from its sale, is a very different matter. How do there happen to be these two theories in the United States? The contention that the state has a title to land under tide-water which it may sell and convey depends historically upon the theory that the *jus privatum* or private property in the soil was *prima facie* in the crown, and not in the owner of the upland. In 1849 Sergeant Merewether, in his argument in *Dickens v. Shaw*,³ said in speaking of this theory: "Up to the period when the Stuarts succeeded to the throne, there is not the slightest pretense or shadow of a case — document or record — to show that any such prerogative existed."

If it is true or substantially true that the *prima facie* title was a new theory at the time of the founding of our American colonies, it is certainly a fact which should be fully considered in determining what is the American law upon this subject.

¹ 16 Pet. (U. S.) 367.

² 14 U. S. 387.

³ Published in Hall on the Seashore, Append. p. cvi.

Sergeant Mereweather adduced many grants and cases to sustain his position that the theory was comparatively a modern one, and following him there was a considerable controversy upon the subject. On this side of the Atlantic we must necessarily depend upon English investigators and their published works, and among these none is more valuable than Stuart A. Moore's *History and Law of the Foreshore and Sea Shore*, — valuable not so much for his conclusions, although they are of great importance, as for the very large number of facts given by him bearing upon his subject. His work is generally accessible, and space permits only the briefest reference to a few of the more important facts for our purpose. Mr. Moore shows that by the end of the reign of King John substantially all the sea-coast of England had been granted in manors, and that in very few instances was there any express mention of the shore. But, on the other hand, he says, "no case has been found and no case can be found, in which it is shown that in any ancient grant the crown has specifically or impliedly reserved the *jus privatum* in the shore."¹ The taking of wreck in itself was not an incident of title, but a royal franchise which was the subject of special grant. There were, however, many grants of the right to take wreck within the lands of the grantee, and Lord Hale, the mainstay of the *prima facie* theory, justly refers to these grants of wreck *infra manerium* as strong presumptive evidence that where they occur the title to the shore was in their owner as his private property.

The times of Edward I. and Edward III. were the times of the wars in France, which unquestionably required large funds for their prosecution. Mr. Moore has given a full account of the minute inquisitions in these reigns in the attempts to discover encroachments upon the royal prerogative and property and thereby increase the royal revenues. These inquisitions were certainly well adapted to discover property rights of the crown, but although the Hundred Rolls, many of which are now accessible, show many presentments for illegally taking wreck, and encroachments upon the public rights of the crown, yet "not a single instance occurs in which it is suggested that the king had then an interest of property in the foreshore outside of the royal manors, although he has an interest of jurisdiction over the whole foreshore."²

The account of the origin of the *prima facie* theory is extremely

¹ Pp. 27-28.

² Moore 45.

interesting. The confiscation of church and college lands by Henry VIII. and Edward VI. led to the concealment of many titles, and these concealments gave rise to the "title hunters," who, discovering or pretending to discover concealed titles, obtained from the crown grants of such lands, which became known as "fishing grants." They then could sue in the courts or compromise with those in possession. It was one of these title hunters, Thomas Digges, who, wishing to obtain possession of certain marsh land which had been originally below high-water mark, first invented the *prima facie* theory, publishing it in a pamphlet in the reign of Elizabeth, A. D. 1568-9. During the remainder of this reign and the reign of James I. these "fishing grants" became an intolerable burden, and Mr. Moore says comprehended at least one half the land of England.

We now reach chronologically three or four facts of great importance in determining the common law which was brought here by the American colonists, — important because they occurred at the time of the early founding of this country. The first of these is the first statute of limitations,¹ with the title "An Act for the General Quiet of the Subject against all Pretenses of Concealment Whatsoever," and which forbade *inter alia* the crown or its grantees from disturbing any possession which had existed for sixty years or more. After the accession of Charles I., however, the crown promptly asserted that the shores and lands previously flowed by the tide were not within the scope of this statute, and about 1630 there began the litigation over the Wapping Wall in London. This finally developed into the case of Attorney-General *v.* Philpott, which is a second fact important for our purpose. The same court which Charles had packed to obtain his famous judgment in the shipmoney case, having refused a trial by jury, decided in favor of the crown's rights, and possession was obtained of a few houses upon the banks of the Thames. Then followed suits of ejectment in the Common Pleas brought by the lessors of those dispossessed against the new tenants, and jury after jury, Mr. Moore tells us, decided against the crown and its tenants until those tenants became the laughing stock of London. This litigation was still proceeding when the more important events of the Long Parliament and the rebellion of 1642 caused it to be forgotten and left the former owners in possession.

¹ 21 James I. c. 2.

Such is one of the two or three cases cited as authority for the *prima facie* theory by Lord Hale. Another is the Prior of Tyne-mouth's case in the time of the Edwards, which Mr. Moore says involved the right of the Prior to establish a new port, but which admitted the soil of the shore to be in him. Lord Hale's statement of the decision goes far to sustain Mr. Moore, for instead of stating it as full authority he says, "Afterwards judgment was given against the prior, but not in express terms for the soil, but implicitly."¹

That Long Parliament, to which Macaulay says every lover of constitutional government throughout the English world owes deep gratitude, was nearly a year old when such leaders of the House of Commons as Pym, Hampden, and Cromwell began to formulate for presentation to the king and nation "A Declaration and Remonstrance of the State of the Kingdom." It is in the debate over this Grand Remonstrance that the two great parties which have ever since contended for the English government found their birth, with the three leaders already named on one side, and Edward Hyde, afterwards Lord Clarendon and father-in-law of James II., as one of those on the other. The Grand Remonstrance contains over two hundred paragraphs specifying illegal acts and usurpations by the crown, and its twenty-sixth article charges the king with "*the taking away of men's right under colour of the king's title to land between high and low water mark.*"

The debate over the Grand Remonstrance extended through many days, and the majority for Pym and his friends was not large. Upon the restoration and for long after, under the leadership of Clarendon's history, it was the fashion to belittle all acts of the Long Parliament and of the Commonwealth. But followed as it was almost immediately by the outbreak of open hostilities between Charles and the parliamentary forces, later generations, and especially we on this side of the Atlantic the settlement of whose country is so largely due to the oppressive government of the English crown at the time of which we are speaking, should realize that the recital of usurpations contained in the Grand Remonstrance are by direct inference declarations of what were then considered to be the common law. When, therefore, it is declared that the crown has taken away men's rights under color of title to the shore, there is no room left to question what was

¹ De Jure Maris, Chap. IV.

then considered to be the law upon this subject by all except the partisan adherents of the crown.

The fourth fact of importance is the case of *Johnson v. Barret*¹ decided in 1646. In the ten years which had elapsed since the decision of Attorney-General *v. Philpott* a complete transformation of the courts had occurred, and the pliant and corrupt tools of the crown had given way to the honest judges of the Commonwealth. *Johnson v. Barret* came before the Court of King's Bench of which Rolle was the head, and Lord Hale, then at the bar, was one of the counsel. The case will bear repeating in full:

"In an action of Trespass for carrying away the soil and timber &c Upon Trial at the Bar the Question arose upon a key that was erected in Yarmouth, and destroyed by the Bailiffs and Burgesses of the Town; and Rolle said that if it were erected between high Water mark and low Water mark then it belonged to him that had the Land adjoining. But Hale did earnestly affirm the contrary; viz that it belonged to the King of common right; But it was clearly agreed, that if it were erected beneath the low Water mark, then it belonged to the King. It was likewise agreed, that an Intruder upon the King's possession might have an Action of Trespass against a Stranger; but he could not make a lease, whereupon the lessee might maintain an *ejectione firmæ*."

The decision is not given in the report, but it is understood to have been in the plaintiff's favor. It would be idle to contend at the present day with large vessels of deep draft and with navigation of waters where there are no tides, as in our great lakes, that there is any difference between the shore above low water and the soil below. The important matter is to reach practical navigation, and no American state, so far as we are aware, has made any such distinction. In fact, Lord Hale makes no such distinction in his treatises.

No one without a strong predilection to the *prima facie* theory can read Lord Hale's treatises, we think, without being struck with the paucity of authority cited to sustain that theory, and the frankness with which he states that the shore and soil under water may be private property, as well as the large number of instances given in which they were actually so held in his own day. It was long ago pointed out by Judge Kirkpatrick in *Arnold v. Mundy*² that he cites, to his all-important proposition that title to the shore may be derived by grant from the crown, five such grants, all be-

¹ Aleyn 10.

² 6 N. J. Law at p. 75.

fore Magna Charta, namely, one by Knute, one by Edward the Confessor, two by William I. and one by John. The industry which could discover these ancient grants was not sufficient to find a single one during the four centuries intervening between Magna Charta and his own time.¹ An unprejudiced examination of his treatises will show that the *prima facie* theory was, in fact as well as name, a mere theory at the time Lord Hale wrote, and that the entire shores of England were in fact held in private ownership, as well as the rights and franchises of the ports.² In the few

¹ It is frequently said, especially in American cases, that Magna Charta prevented any such grants. See for example *Martin v. Waddell*, 16 Pet. (U. S.) at pp. 412-413, *Clement v. Burns*, 43 N. H. at p. 616. There is much force in this view, but it seems to be based upon the "equity" of the statute and the absence of later grants rather than upon its express terms.

² Thus in Chap. V. of the *De Jure Maris* he cites a number of instances of the right of fishery in front of the upland introducing them with the statement: "Now for precedents touching such rights of fishery in the sea and arms and creeks thereof belonging by usage to subjects, the most whereof will appear to be by reason of the propriety of the water and soil wherein the fishery is, and some of them even within the ports of the sea." He then refers to numerous statutes prohibiting the erection of waeres in navigable rivers, etc., and calls attention to the fact that these statutes excepted waeres on the sea-coast, and says:

"The exception of waeres upon the sea coast, and likewise frequent examples, some whereof are before mentioned, make it appear that there might be such private interests not only in point of liberty, but in point of propriety on the sea coast and below the low water mark; for such were regularly all waeres." And after referring to still other statutes:

"But in all these statutes, though they prohibit the thing, yet they do admit, that there may be such an interest lodged in a subject, not only in navigable rivers, but even in the ports of the sea itself contiguous to the shore, though below the low water mark, whereby a subject may not only have a liberty but also a right or propriety of the soil."

In the *De Jure Maris* in its earlier form published by Mr. Moore (p. 364), he said:

"1 — I conceive that *littus maris* may questionless belong and be parcel of a subject's manor, which is the point resolved in Sir H. Constable's case, 5 Rep. 107," etc.

"2 — The cases above and likewise ordinary experience prove that it is most ordinarily parcel of the adjoining land."

In the later form of his treatise, that in which it has long been known, he has changed this to read:

"3d — It may not only be parcel of a manor, but *de facto* it many times is so; and perchance it is parcel almost of all such manors as by prescription have royal fish or wrecks of the sea within their manor," (for wrecks and fish are left between high and low water by the receding of the tide) . . . "He therefore that hath wreck of the sea or royal fish by prescription *infra manerium*, it is a presumption that the shore is part of the manor, as otherwise he could not have them."

The case of the Sutton Marsh (Chap. VI. of *De Jure Maris*), in 12 Charles I. is of considerable interest because of the fine distinctions of pleading made to sustain the decision between *relictam* and *projectam*, and still more because of the distinction between the open sea and ports and rivers. He says:

instances given by him where the crown tried to assert its *prima facie* title, it met with vigorous opposition, and where a jury was permitted, as in the Shinberdge case near Bristol, the verdict and judgment was against the crown. Mr. Moore makes this significant statement: ¹ "From the time that Digges first attempted to recover the marsh and fore shore from Hammond in 17 Elizabeth, A. D. 1574, until the present day, so far as I can discover, no jury has been found (with one exception) to give a verdict for the crown against evidence of user on the part of the subject. In the exception mentioned, on a second trial the verdict was against the crown." And his statement is fully justified by the reported cases.²

With this state of the common law in England, it is certainly most natural that the colonists should establish, not only in Connecticut, but in all other colonies, except in New York with its special history as a royal province, and except also perhaps in the Massachusetts Bay Colony in the immediate neighborhood of Boston, that law of the shore which has come to be known as the common law of this country upon the subject. It would have been an historical anomaly requiring some special explanation, if they had adopted any other.

While there are no historical facts to indicate that the law of Connecticut is at all different from the law of England as understood by the people in the early part of the seventeenth century, there are abundant historical facts to show that the law of New York is due to the same attempted usurpations of authority and property by the Stuart dynasty which led to their final overthrow

"But although a subject cannot acquire the interest of the narrow seas, yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz. of a *districtus maris*, a place in the sea between such points, or a particular part contiguous to the shore, or of a port or creek or arm of the sea."

But not only *may* the subject have title to the soil, but it was usually held in private ownership. Thus in his *De Jure Maris* he says:

"That a subject having a port of the sea may have, and indeed in common experience and presumption hath, the very soil covered with water; for though it is true, the franchise of a port is a differing thing from the propriety of the soil of a port, and so the franchise of a port may be in a subject, and the propriety of the soil may be in the king or in some other, yet in ordinary usage and presumption they go together."

And he gives several instances.

¹ History and Law of the Foreshore, 616.

² See 1808, *Rogers v. Allen*, 1 Camp. N. P. 309 (Several Fishery); 1821, *Chad v. Tilsed*, 5 Moore (C. P.) 185; 1821, *Blundell v. Catterall*, 5 B. & A. 268; 1828, *Lopez v. Andrews*, 3 Man. & R. 329 N; 1848, *Calmady v. Rowe*, 6 C. B. 861; 1849, *Beaufort v. Swansea*, 3 Exch. Rep. 413; 1863, *Atty-Gen. v. Jones*, 3 H. & C. 347; 1863, *Malcomson v. O'Dea*, 10 H. L. Cas. 591 (Fishery); 1879, *Lord Advocate v. Blantyre*, 4 App. Cas. 770.

by the Revolution of 1688: Settled by the Dutch, New York became an English Colony only by conquest in 1664, and it was granted by Charles II. as a royal province to his brother, the Duke of York, afterwards James II. Four commissioners, of whom Richard Nicol was chief and Samuel Maverick, of Boston, another, were appointed for all the Northern colonies, to settle sundry disputes between them, and also, clearly, to extend as far as possible the royal authority and control over them. Nicol usually remained in New York as its governor, and in that capacity was the personal representative of the Duke of York. One of Nicol's first acts was to promulgate "The Duke's Laws," one provision of which deserves repetition as showing that the spirit of government by prerogative and for the crown's personal benefit which characterized the Stuarts was not forgotten on this side of the Atlantic:

"To the end all former Purchases may be ascertained to the present possessor or right owner. They shall bring in their former Grants, and take out new patents for the same from the present Governor in the behalf of his Royal Highness the Duke of York. . . . Every purchaser in acknowledgment of the propriety of such lands belonging to his Royal Highness James, Duke of York, shall upon sealing of the Patent pay unto the Government so much as they shall agree upon."¹

About twenty years after Governor Nicol arrived in New York, Dongan was sent from England as the royal governor of that province, and it was he who granted in 1686 to the city of New York its first charter. This charter contains the grant to the city of the fee of all streets (whence is derived the law of New York in that respect), of open and unappropriated spaces, and the shore around the Island of Manhattan between high and low-water marks. This first charter was repeated verbatim in that of 1730, and can thus be found in the Appendix to Brook's History of New York City.² About the same time many similar grants were made by the royal governors to various other towns and municipalities,³ and in 1730 the second charter to the city of New York was granted by Governor Montgomerie. This charter added to the

¹ 1 Colonial Laws of New York, 44.

² See p. 794, §§ 2-3, for streets and shore.

³ Several reported cases involved such grants. See *Rogers v. Jones*, 1 Wend. (N. Y.) 237 (Oyster Bay); *Trustees v. Strong*, 60 N. Y. 56 (Brookhaven); *Trustees v. Kirk*, 68 N. Y. 459 (East Hampton); *Robins v. Ackerly*, 91 N. Y. 98 (Northport); *Town of Southampton v. Mecox & Co.*, 116 N. Y. 1 (Southampton); see *De Lancey v. Piepgras*, 138 N. Y. 26, and compare *People v. Van Rensselaer*, 9 N. Y. 291.

prior grant of the shore a strip apparently from headland to headland and extending four hundred feet under tide water around the southern end of Manhattan Island.¹

Next came the ratification in the fullest terms by the Colonial Legislature of 1732 of all grants to the city of New York under the great seal,² and finally the ratification by the people in the first State Constitution of 1777.³ These royal grants to the city of New York thus confirmed, together with other similar grants from the royal governors, have established the law of the state, in the same way and perhaps with greater certainty than the grants in Boston and its vicinity have established the law of Massachusetts.

New York has always consistently acted upon the law thus determined. By virtue of the original grants and the purchase of a few still older titles to wharf property, the city of New York owns its entire water front, and has from time to time received other grants from the state. In front of Brooklyn and Staten Island the state has established two lines, the bulkhead line and the pier line, one outside the other. These lines are not, however, harbor lines in the sense the term is used in Connecticut and some other states, for any riparian owner must still obtain by purchase from the state title to the particular flats inside those lines before he can build upon them, and at the same time the state has full power to sell those flats to one who is not the owner of the upland. The federal government has also established lines which, because it cannot possibly own the soil, are true harbor lines. In the autumn of 1903 the city of New York, having obtained the necessary authority from the state, sought to extend their piers further into the North River, and Mr. Root, as Secretary of War, refused his permission. His successor, Judge Taft, has declined, we are informed, to reconsider this refusal. Thus, even the state's title is held subject to the police control of the federal government for the preservation of the public right of navigation.

The history of New Jersey law upon this subject is simple. The

¹ Brook's History, Appendix 819, § 38.

² Parker's Laws of New York, 1691 to 1751, p. 207.

³ The New York Court of Appeals in *Sage v. New York* (154 N. Y. 61 at p. 82), after referring to the foregoing charters says of the act of 1732: "The effect of that act, standing alone upon a grant made in violation of Magna Charta, it is unnecessary to now consider; for it was confirmed by the Constitution of 1777, which was the result of all the legislative power that the people of the State of New York, untrammelled by any higher law, could exert." See also *Trustees of Brookhaven v. Strong*, 60 N. Y. 56, 67-70.

colonists introduced the same English law as did those of Connecticut and other colonies, and it remained the law of the state until the case of *Stevens v. Paterson & Newark R. R. Co.*, in 1870, adopted what was then understood to be the law of New York, but without the excuse of any of the historical reasons or of the constitutional ratification of New York.

There are, however, certain historical facts connected with New Jersey of great interest. The limits of the present state were included in the grant of New York by Charles II. to his brother and became part of the royal province. The Duke of York almost immediately transferred the greater portion, at least, of New Jersey to Sir George Carteret, transferring to him all property rights and all rights and powers of sovereignty and government as fully as he himself had held them, and all these later became vested in certain proprietors. These proprietors in 1702 surrendered their powers of sovereignty and government by language evidently carefully chosen to make it plain that they intended to retain all rights of property, and afterward made certain grants of soil under water. If the Crown and the Duke of York owned the shores below high water and lands under water in such sense that they could separate them by sale and conveyance from their governmental powers — in other words, if they owned them as property and not merely as a trust for the public or in the technical sense of being subject to a police power of regulation — it is difficult to see why these later proprietors did not retain the property upon their surrender of their governmental powers. But when one of these grants came before the state courts, and later before the Supreme Court of the United States in *Martin v. Waddell*,¹ it was held void. The minority opinion of Thompson, J., shows how clearly the issue was understood in the decision of this case.²

Martin v. Waddell was decided in 1842. After the decision in *Stevens v. Paterson & Newark R. R.*, in 1870, there came the case of *Stockton v. Baltimore, etc., R. R. Co.*,³ an information by the Attorney-General of New Jersey praying an injunction against the defendant to prevent the erection of a bridge across the Arthur

¹ 16 Pet. (U. S.) 367.

² Compare with *Martin v. Waddell* the Portsmouth harbor case, where the Court and House of Lords declined to sustain a grant of the shore made by Charles I. *Atty.-General v. Parmenter*, 10 Price 378, 412.

³ 32 Fed. Rep. 9.

Kill to Staten Island, "upon lands of the State situated on the shore and under the waters of the Kill," and it was contended that under the fifth amendment "the property of the State in lands under its navigable waters is private property and comes strictly within the constitutional provision,"¹ a claim in full accord with the view of absolute property in the state then and now held in New Jersey.

Mr. Justice Bradley of the Supreme Court gave the decision of the Circuit Court, and says on the same page: "The information rightly states that, prior to the Revolution, the shores and lands under water of navigable streams and waters of the province of New Jersey belonged to the King of Great Britain, as part of the *jura regalia* of the Crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the State as they were by the king, *in trust* for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris*; in other words, they were held for the use of the people at large," and the decision was that the state could not recover as for private property.

It is worth remembering, also, that the legislatures of both New York and New Jersey, while claiming and exercising the right to sell and convey lands under water, have always had a tender regard for the common impression everywhere prevailing that the riparian owner has some rights in front of his land. As a general rule in New York, the riparian owner has received the privilege of the first opportunity of acquiring such property from the state, and in New Jersey, while the State gives a preference to such owners on the shores of New York harbor for a limited time only, it makes such grants to riparian owners only throughout the rest of the state.²

Although it is probably impossible to trace the law of Massachusetts with certainty to any particular connection with the *prima facie* theory as understood by the English crown, yet the early grants by the General Court of the colony in exact conformity with that theory and the practice of the crown under it, lie at the foundation of its present law.

¹ P. 19.

² For New Jersey statutes see *Fitzgerald v. Faunce*, 46 N. J. Law 536, 592, etc.

The earliest of these grants, at least the earliest the evidence of which is accessible outside of Massachusetts, is that of the flats about Noddle's Island (East Boston), made in May, 1640: "It is declared that the flats round about Nodles Iland do belong to Nodles Iland to the ordinary lowe water marke."¹ This has always been regarded by the Massachusetts courts as a grant of the soil. Thus Gray, J., in *Boston v. Richardson* says:² "The fact, that after grants of property in the island to a private person in fee, and of the jurisdiction thereof to the town of Boston, an express order was made as to the flats around it, strongly implies that the title in those flats would otherwise have remained in the colony."³

Want of space forbids a detailed reference to many other early colonial grants of the shore in Massachusetts Bay,⁴ but two others are of such importance as to require special notice. In 1647 was passed the famous Massachusetts colonial ordinance. It is now well understood that this was an addition to the prior ordinance of 1641, which was as follows: "Every inhabitant that is an house holder shall have free fishing and fowling in any great ponds and bayes, coves and rivers, so farr as the sea ebbs and flowes within the presincts of the towne where they dwell, unless the free men of the same towne or the General Court have otherwise appropriated them: provided that this shall not be extended to give leave to any man to come upon others propertie without there leave." This ordinance thus recognizes the fact that the General Court and some of the towns had previously made special grants or dispositions of the shore below high-water mark. It ends with a proviso, and the ordinance of 1647 is in terms an amendment. It is as follows: "The which clearly to determine . . . it is declared that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebbe above a hundred rods, and not more wheresoever it ebbs further: provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands." There is some evidence that in the early

¹ 1 Rec. of Mass. 291.

² 105 Mass. at foot of p. 359.

³ See also *Commonwealth v. Roxbury*, 9 Gray (Mass.) at p. 495.

⁴ See note at 9 Gray (Mass.) 503, where mention of many such grants will be found.

days it was understood that the riparian owner had the same right to wharf out without any grant of the soil as he had in Connecticut and Rhode Island;¹ and certainly when we carefully read these two ordinances of 1641 and 1647, they very clearly disclose two distinct views as to rights in the shores, with the victory for the time being resting with the riparian owner as against the public. In fact the ordinance of 1647 has also always been regarded by the Massachusetts courts as a grant of the soil by the General Court.²

In 1673-1674 came the famous barricado grant in Boston. It is said, in *Brimmer v. Proprietors*,³ to have been made by the town of Boston, and in *Commonwealth v. Alger*,⁴ to have been by the colonial government. But whatever authority made the grant, it was evidently made without regard to riparian ownership, and thus differed from most of the prior grants. It was also either below low-water mark or the cove then forming substantially the entire port of Boston⁵ was above low-water mark. In any event it was certainly a grant of the soil for "200 feet inwards, towards the town, and so on the other side, of the same width, to the channel in the harbor,"⁶ and becomes a strong instance of the assertion at an early day of the right of the government to make grants of soil under tide-water without regard to the ownership of the adjoining upland.

In addition to these and other early grants, there are said to have been many liberties to wharf out in Boston between 1640 and 1660. But these may be readily referred to the police power of regulating navigation, and are for this reason rejected as a basis for Massachusetts law.⁷

The state of Massachusetts has always continued to make similar grants of flats beyond the 100-rod line, and low-water

¹ See Gray, J., in *Boston v. Richardson*, 105 Mass. at p. 361; also 9 Gray (Mass.) pp. 514-515.

² See "The Case of 1649," 2 Mass. Rec. 284. For the ordinances of 1641 and 1647, see 7 Cush. (Mass.) pp. 67-68; 105 Mass. pp. 353-354. The statement so frequently repeated that the ordinance of 1647 was designed for the promotion of navigation by encouraging the building of wharves, would seem to be without the slightest foundation. See *Concord Co. v. Robertson*, 66 N. H. 1, 26-27.

³ 5 Pick. (Mass.) at p. 130.

⁴ 7 Cush. (Mass.) at p. 73.

⁵ 7 Cush. (Mass.) at foot of p. 72 and middle of p. 73.

⁶ 5 Pick. (Mass.) at p. 136.

⁷ Gray, J., in *Boston v. Richardson*, 105 Mass. 351, 360, and 363.

mark, many times by special grant.¹ And there are said to have been hundreds of them prior to the act of 1869 declaring that thereafter they should be construed as revocable licenses.²

The Massachusetts court has fully recognized that the foregoing early grants of the soil under tide-water have established the law of Massachusetts, and made it different from that of other states, as, for example, Connecticut.³ The rights of the riparian owner in Massachusetts Bay may be said for all practical purposes to have originated with the ordinance of 1647. By that ordinance he was granted an absolute title in fee to low water or the 100-rod line, and so it seems to have been considered until 1851, when *Commonwealth v. Alger*⁴ was decided. The case was an indictment for extending a wharf beyond a harbor line laid between high and low-water mark. The court held that the riparian owner's title was still subject to the police power of the state for the promotion of navigation and that the defendant was guilty. As might naturally be expected, the decision was followed by the Statute of 1866 (chap. 149), which provided for harbor commissioners and gave them jurisdiction over all erections below high-water mark. The riparian owner in Massachusetts has therefore now no greater rights even to low water wherever the harbor commissioners have jurisdiction than similar owners in Connecticut.⁵

Although it is impossible to trace the colonial grants in and around Boston with any certainty to the same conception of the royal prerogative and its exercise as those in New York, yet it is certain that these early grants have established the law of Massachusetts as we find it to-day. As is well known, the settlement of Boston

¹ See *Fitchburg R. R. Co. v. Boston & Maine R. R.*, 3 Cush. (Mass.) at pp. 71 and 87. Also *Attorney-General v. Boston Wharf Co.*, 12 Gray (Mass.) at pp. 561-562, where several grants to the same proprietors are mentioned, all of which upon examination are found to be special and private grants.

² *Bradford v. McQuester*, 182 Mass. 80.

³ See *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 72 *et seq.*; *Commonwealth v. Roxbury*, 9 Gray (Mass.) 451, 478-499; *Boston v. Richardson*, 105 Mass. 351, 358-371.

It is interesting to compare the statements of Shaw, C. J., that the state's title is held in trust for the public in the first two of the above, with such later cases as *Moore v. Sanford*, 151 Mass. 285; *Commonwealth v. Boston Terminal Co.*, 185 Mass. 281.

In the latter of these cases the court distinctly says that the limitation of a public trust is no longer recognized in Massachusetts.

⁴ 7 Cush. (Mass.) 53.

⁵ It is also an interesting query why the same reasoning which in *Commonwealth v. Alger* makes the title of the riparian owner subject to the police power, does not also reduce the title of the state to that of a mere police control.

was by colonists sent out by the home company located in London to which the royal grant had been made. This company was composed of educated men who administered its affairs with intelligence and sent out educated men as their representatives upon this side of the Atlantic, selecting and appointing Endicott and Winthrop as governors before the departure of the colonists from England. The charter was always construed as a grant not only of sovereignty, but also of actual title to all lands within its boundaries, and no title to any lands in the Massachusetts Bay could be or was acquired except by grant from the corporation either directly from the General Court or indirectly from the towns as municipalities, although there appears in very early days to have been some confusion between the Court and the towns in this respect. In fact, great care appears to have been taken that there should be no outstanding title not derived under the royal charter in some way. Thus grants were made confirming the titles of such men as Maverick, Blaxton, and Thompson, who had settled about Boston harbor before the arrival of Winthrop and his companions, to such lands as they had already occupied, and one of them, Walford, who would not recognize the new government, was banished.

Thus the titles to all lands in the Massachusetts Bay Colony were first public in a much more complete sense than were the lands in England when William the Conqueror and his immediate successors made their grants, and the foregoing early grants of shore and soil under water place a practical and contemporaneous construction upon the extent of the grants of upland intended, which could not be ignored when the Massachusetts courts were called upon to determine what was the law of the state, any more than the courts of New York could ignore the early grants made in that state. The "Proprietors" of Rhode Island and Connecticut were wholly unknown in Massachusetts Bay.

Maryland was also a proprietary province, but apparently there never were any early colonial grants of soil under water as in Massachusetts and New York. It is not, however, easy to determine just what is the law of Maryland. Its courts apparently declare the theoretical right of the state to make grants of such soil, but at the same time the riparian owners appear to have large and substantial rights of wharfing and filling, at least in Baltimore, by a colonial act of 1745, if not before.

Probably Connecticut and Rhode Island are the best examples

of systems of land titles not originally derived from the English crown. One of the most serious "heresies" of Roger Williams was that he denied the validity of the titles to land in the Bay Colony, asserting that valid titles could be obtained only from the Indian aborigines, and upon his banishment to Rhode Island he put his theory into practice by purchasing from the Indian chiefs the land now occupied by the city of Providence. The same thing is true of the Island of Rhode Island and appears to be also true of the Connecticut titles. In each of these instances the titles became vested in "Proprietors" who owned all land within the limits of their respective purchases in private ownership, and all original titles are by grants from these proprietors. Later on, it is true, evidently in response to a demand that these titles be theoretically ratified after the charters were obtained from the crown, acts were passed by the legislature of each colony, but these acts expressly ratified and confirmed the titles already held.¹ To say that in thus confirming to the proprietors titles already held, there was an exception of the shore and land under water in favor of the state, is to imply something which is certainly not expressed. In *East Haven v. Hemingway*² the claim went one step further. The action was brought by a grantee from the proprietors of sea shore under a grant made after the colonial confirmatory act, against a riparian owner holding under an early grant of the upland made many years before by the then proprietors. The argument was that as the title to the shore was in the crown, it could be derived only by grant from the crown, and was therefore first obtained by the colony by virtue of the colonial charter and first conveyed by the colony to the proprietors by act of the legislature. Therefore the proprietors then first obtained anything which they could grant, and they had first granted it to the plaintiff. This theory of necessity denied that the riparian owner holding under any earlier grant of upland took any interest below high-water mark. The court rejected this ingenious argument, and held that rights in the shore are adjuncts to the upland bordering upon it.

There is probably an entire absence of any early express grants to the shore or soil under water in both Connecticut and Rhode Island, either by the colonial or town authorities, — there are cer-

¹ R. I. Act of 1682; for the Connecticut law, see *East Haven v. Hemingway*, 7 Conn. 186.

² 7 Conn. 186.

tainly none in Rhode Island, — and there is therefore nothing in the history of land titles in these states upon which to base a claim that the *prima facie* theory ever became established as their law.

The two comparatively recent decisions of the United States Supreme Court upon this subject, *The Illinois Central Railroad v. People of Illinois*¹ and *Shively v. Bowlby*,² are said to be in conflict with each other.³ But it can hardly be assumed that the court would permit both cases, decided within sixteen months, to stand as authorities if they supposed that there was any inconsistency between them. The explanation of the apparent conflict appears to be simple. *Shively v. Bowlby* was a writ of error to the Supreme Court of Oregon, and the court as usual in cases involving title to real property followed the law of Oregon as declared by its highest court.⁴ The Illinois Railroad case on the other hand was an appeal in equity from the federal Circuit Court for the Northern District of Illinois, and the Supreme Court of Illinois had not apparently determined the law of the state at that time, so that the court was free to ascertain and apply the common law. The case involved the validity of a grant made by the state to the railroad in 1869 of a large tract under the waters of Lake Michigan in front of the city of Chicago, — the railroad maintaining its validity, and the state that there were certain constitutional defects in the passage of the act which gave it the power to revoke the grant, as it had attempted to do in 1873. The minority opinion, including Mr. Justice Gray of Massachusetts, who afterwards gave the opinion in *Shively v. Bowlby*, accepted the railroad's contention, resting for authority upon reported cases from several states adopting the New York view of the law of this subject. The majority opinion accepted neither contention, but held the grant of 1869 void as being beyond the power of the state legislature to make, saying that it could no more abdicate its trust over such property in which the whole people are interested than it could abdicate its powers of government. At the same time the court held both the city of Chicago and the railroad entitled to the riparian rights of wharfing and filling as an incident of their ownership in fee of certain lots bordering upon the lake.

The majority opinion, however, excepts from the legislature's lack of power to make grants of soil under water not only parcels

¹ 146 U. S. 387.

² 152 U. S. 1.

³ In *Cobb v. Lincoln Park Commissioners*, 202 Ill. 427.

⁴ See 152 U. S. at p. 57.

for the improvement of navigation, but also parcels which can be disposed of without impairment of what remains, saying that the grant of such parcels is a very different thing from the abdication of the general control over lands under an entire harbor or bay. Exactly what did the court mean by these statements? Respecting grants made strictly for the aid of navigation, as for light-houses and jetties, there can be no question. But apparently the court meant to go further. It has been customary from the earliest days of their existence in probably all our states for the legislature to grant rights to construct bridges and highways and, later, railroads across the public waters. But it does not appear to be a legitimate inference from such grants that the state necessarily has a private commercial title to the soil under water. It would rather seem that the grants were merely declarations that soil already subject to public rights of navigation could be devoted to other public purposes without detriment to the public, and it would further seem that they should be made subject to compensation for private riparian rights only where it becomes necessary for the grantee to take such property rights. To go beyond this and say that the state has power to make such grants because it is the owner in a private capacity of the soil, is to draw a distinction between small and large parcels which it would be difficult to sustain upon any principle. If we adopt the law of New York and New Jersey, the state legislature may make such grants, small or large, with very little if any regard to the riparian owner, for such owner has substantially no property rights. If, on the other hand, we adopt the Connecticut doctrine, the legislature can grant such parcels, whether large or small, only for public purposes and subject to constitutional provisions for compensation to the riparian owner for the taking of his property. Because the majority opinion in the Illinois railroad case has fully sustained riparian rights of wharfing and filling where they properly exist, it would seem that the court did not mean to assert that small parcels could be granted without reference to those rights any more than large parcels, and that the statements respecting the granting of small parcels should be construed as assertions of what had at times in fact been granted, rather than as statements modifying or limiting the principles of law announced.¹

¹ In the following cases small or comparatively small grants were held to be void upon the same principle as enunciated in the Illinois Central Railroad case, *viz.*: *Prieve v. Wisconsin, etc., Society*, 93 Wis. 534; *Union Depot Co. v. Brunswick*, 31

A suggestion had been advanced to sustain the power of our state legislatures to make grants of soil under water which deserves a brief consideration. The court in *Stevens v. Paterson & Newark R. R. Co.* attempted to sustain their decision upon the ground that the state legislature had all the powers of the British Parliament, and that though the crown might not have had the right to grant soil under tide water, Parliament and consequently the state legislature in the exercise of their more ample powers could do so. The same thought has been repeated at times in other cases and in at least one text-book.¹ The court does not, however, cite any instance in which Parliament ever made such a grant, nor does it show whence it could derive any such power. Aside from the fact that Magna Charta and the statute *Quia Emptores* appear to have had much to do with the law upon this subject, and even Parliament with all its powers would not at any time within several centuries at least have ventured to act contrary to their mandates, it is impossible, we think, to find any basis for imputing to Parliament any greater power to make private grants of soil under navigable water than the crown possessed. If such soil is the proper subject of ownership in the sense that it can be sold and disposed of as private property, its owner according to all legal precedents should have that power of disposal, whether that owner be the crown or the government represented by Parliament or the state legislature. If on the other hand the so-called title is a technical one held in substance for the general good of the people, the legislature should have no greater power than any other trustee of the same trusts.

As a matter of fact, when this theory of the law in this country is examined historically, there is not the slightest ground for deriving it from any power of Parliament. It comes from New York and Massachusetts Bay, and in the former is derived directly from grants made by the early colonial governors as the personal repre-

Minn. 297; *Norfolk City v. Cooke*, 27 Gratt. (Va.) 438. And see also *Rossmiller v. State*, 114 Wis. 169.

¹ The matter for this article was collected and much of it put together before the writer saw the work of Mr. Farnham on *Water and Water Rights*. While Mr. Farnham fully and frankly states that the *prima facie* theory was new in England at the time of the founding of our American colonies, he would seem to think that the new theory was transferred to this country much more universally than appears to have been the case. But it would also seem to be very clear that he has not traced out and comprehended how the early historical grants in Massachusetts Bay and New York have determined the law of those colonies contrary to that of most, if not all, of the other original states.

sentatives of the English crown, and in the latter from a very thorough system of land titles which were from the very outset theoretically and practically traced to the same source. The only difference between the two colonies is that in one there were express grants by the crown's representative of parcels of shore and soil under water, while in the other the colonists at once construed the broad grant of the crown as enabling them to make grants of the upland and of the shore separately, but with both directly traced back to the common source,—the crown's grant by the charter. The historical reason why the law of Connecticut differs from that of Massachusetts is that there was no grant from the crown in the first instance, and when such a grant was later obtained, instead of placing a contemporaneous construction upon it by making separate grants of the shore, the rights of the riparian owner to wharf and fill out were still regarded as incidents of his prior ownership of the upland, in accordance with the customary ownership at the time among the people of England as distinguished from the claims of the crown and its officers under the *prima facie* theory.

If this article succeeds in calling the attention of the legal profession not only to the existence of the two distinct theories of shore rights and titles existing in this country, but also to the historical reasons why they exist, and some of the incidents necessarily flowing from the existence of each, it will have accomplished every end sought.

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PROVIDENCE, R. I.

WAIVER IN INSURANCE CASES.

THERE are thousands of cases and hundreds of text-book pages explanatory and illustrative of the doctrine of waiver in its relation to insurance cases. What, then, is to be thought of the suggestion that this mass of learning proceeds upon a fundamentally erroneous principle; that election, and not waiver, is the doctrine really involved; that waiver is a sort of interloper, if not altogether an impostor; and that the substitution of election for waiver will produce a most substantial and valuable improvement in judicial methods and conclusions?

First, let us understand precisely what waiver is, or is said to be. It has been variously defined as follows:

“An intentional relinquishment of a known right.”¹

“The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the company has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the condition.”²

¹ *Kent v. Warner*, 1866, 94 Mass. 563; *Stewart v. Crosby*, 1863, 50 Me. 134; *Shaw v. Spencer*, 1868, 100 Mass. 395; *West v. Platt*, 1879, 127 Mass. 372; *Boynton v. Bralley*, 1881, 54 Vt. 92; *Dawson v. Shillock*, 1882, 29 Minn. 191; *Portland Ry. Co. v. Spillman*, 1893, 32 Pac. Rep. 688 (Or.); *Hecht v. Brandus*, 1893, 4 N. Y. Misc. Rep. 58; *Rice v. Fidelity, etc.*, 1900, 43 C. C. A. 270; 103 Fed. Rep. 427; *Fairbanks, etc., v. Baskett*, 1903, 71 S. W. Rep. 1116 (Mo.); 28 Am. & Eng. Ency. 526.

² *Bigelow, Estoppel*, 5th ed., 672. May, Ins. § 507. And see § 469 (c). The book has a chapter upon “Waiver and Estoppel,” in which no attempt is made to distinguish between them (Cap. 23). *Per* Field, J., in *Ins. Co. v. Wolff*, 1887, 95 U. S. 333; *Union, etc., v. Manhattan, etc.*, 1898; 26 So. Rep. 800 (La.); *Grabbs v. Farmers, etc.*, 1899, 125 N. C. 389; 34 S. E. Rep. 503; *Northern, etc., v. Grand View, etc.*, 1901, 183 U. S. 339; 22 Sup. Ct. Rep. 633; *Société, etc., v. Moisan*, 1898, 7 Quebec Q. B. 131. Cases too numerous for beneficial citation accept this view, or at all events refer to estoppel as identical with waiver. The following may be mentioned: *Blake v. Exchange*, 1858, 12 Gray (Mass.) 265; *Hoxie v. Home, etc.*, 1864, 32 Conn. 40; *Diehl v. Adams, etc.*, 1868, 58 Pa. St. 452; *Elliott v. Lycoming, etc.*, 1870, 66 Pa. St. 22; *Jewett v. Home, etc.*, 1870, 29 Ia. 562; *Security, etc., v. Fay*, 1871, 22 Mich. 467; *Levin v. Phoenix, etc.*, 1876, 44 Conn. 91; *Abbott v. Johnson*, 1879, 47 Wis. 239; 2 N. W. Rep. 332; *Northwestern, etc., v. American*, 1887, 119 Ill. 329; *Fairbanks, etc., v. Baskett*, 1903, 71 S. W. Rep. 1113 (Mo.). The necessity for a change of position is implied in *Rixley v. Ætna, etc.*, 1864, 30 N. Y. 136; *Ins. Co. v. Wolff*, 1877, 95 U. S. 330; *Niagara*

"Waiver need not be based upon any new agreement or an estoppel."¹

"The principle upon which the waiver of a forfeiture has been maintained in such cases is undoubtedly similar to that of estoppel."²

"While a waiver of forfeiture need not be based upon a technical estoppel, yet in the absence of an express waiver some of the elements of an estoppel must exist."³

"A waiver to be operative must be supported by an agreement founded on a valuable consideration ; or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition."⁴

"Waiver unsupported by consideration is not binding."⁵

"As to waiver, it is difficult to say precisely what is meant by the term with reference to the legal effect. A waiver is nothing unless it amounts to a release. It is by a release or something equivalent only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right, which in equity will not, without consideration, bar the right any more than, at law, accord without satisfaction would be a plea."⁶

Ins. Co. v. Miller, 1888, 120 Pa. St. 517 ; *Redmond v. Canadian*, etc., 1891, 18 Ont. App. 342 ; *Atlas*, etc., *v. Brownell*, 1899, 29 S. C. Can. 537 ; *Traders*, etc., *v. Cassell*, 1900, 56 N. E. Rep. 259 ; *Rice v. Fidelity*, etc., 1900, 43 C. C. A. 270 ; 103 Fed. Rep. 427 ; *Mobile*, etc., *v. Pruett*, 74 Ala. 487.

¹ *Titus v. Glen's Falls*, etc., 1880, 81 N. Y. 419 ; *Mee v. Bankers*, etc., 1897, 69 Minn. 210 ; 72 N. W. Rep. 74 ; *Gorson v. Anchor*, etc., 1901, 113 Iowa 641 ; 85 N. W. Rep. 806 ; *Modern*, etc., *v. Lane*, 1901, 62 Neb. 89 ; 86 N. W. Rep. 944 (cases) ; *Supreme*, etc., *v. Hall*, 1901, 56 N. E. Rep. 783 ; *Johnston v. Phelps*, etc., 1901, 63 Neb. 21 ; 88 N. W. Rep. 142 ; *Hartford v. Landfare*, etc., 1902, 88 N. W. Rep. 779 ; *Cassimus v. Scottish*, etc., 1902, 33 So. Rep. 167 (Ala.) ; *Hartford*, etc., *v. Landfare*, 1902, 88 N. W. Rep. 779 (Neb.) ; *Mee v. Bankers*, etc., 1897, 69 Minn. 210 ; 72 N. W. Rep. 74.

² *Hollis v. State*, etc., 1884, 65 Iowa, 454 ; 21 N. W. Rep. 774. Approved in *Home*, etc., *v. Kennedy*, 1896, 47 Neb. 138, 66 N. W. Rep. 279 ; and see *Billings v. German*, etc., 1882, 34 Neb. 502 ; 52 N. W. Rep. 379 ; *Wiedert v. State*, etc., 1890, 19 Ore. 261 ; 24 Pac. Rep. 242 ; *Frasier v. New Zealand*, etc., 1901, 64 Pac. Rep. 816.

³ *Holt on Insurance* 623 ; *Armstrong v. Agricultural*, etc., 1890, 130 N. Y. 565 ; 29 N. E. Rep. 991 ; *Ronald v. Mutual*, etc., 132 N. Y. 356 ; *Gilson*, etc., *v. Liverpool*, etc., 1899, 159 N. Y. 418 ; 54 N. E. Rep. 23 ; *Meech v. National*, etc., 1900, 50 N. Y. App. Div. 144 ; 63 N. Y. Sup. 1008 ; *Germania*, etc., *v. Pitchen*, 1902, 64 N. E. Rep. 922 (Ind.).

⁴ *Ripley v. Ætna*, etc., 1864, 30 N. Y. 136 ; *New York*, etc., *v. Watson*, 1871, 23 Mich. 486 ; *McFarland v. Peabody*, etc., 1873, 6 W. Va. 430 ; *Underwood v. Farmers*, etc., 1874, 57 N. Y. 506 ; *Merchants*, etc., *v. Lacroix*, 1876, 45 Tex. 168 ; *Northwestern v. Amerman*, 1887, 119 Ill. 329 ; *Texas*, etc., *v. Hutchins*, 1880, 53 Tex. 68.

⁵ 28 Am. & Eng. Ency. 531. And see *Belknap v. Bender*, 1878, 75 N. Y. 453 ; *Lantz v. Vermont*, 1891, 139 Pa. St. 546.

⁶ *Stackhouse v. Barnston*, 1805, 10 Ves. 466. Waiver at law and in equity are the same thing. *Commercial*, etc., *v. New Jersey*, etc., 1901, 49 Atl. Rep. 157 (N. J.).

"The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has the right of re-entry, he may elect to avoid or not to avoid the lease. In strictness therefore the question in such cases is: Has the lessor, having notice of the breach, elected not to avoid the lease, or has he elected to avoid it, or has he made no election?"¹

"Waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted on."²

Irrespective of the disagreement as to whether waiver must be based upon intention, there are six different views presented in these extracts, and for each of them plenty of authority can be cited:

1. Waiver is purely unilateral. That is to say, it is completed by the act of one only of the parties interested.

2. Waiver is bilateral. The acts, however, are not simultaneous, but in sequence. That is to say, upon the faith of the act of one party the other changes his position. This is estoppel.

3. Waiver is bilateral. It is not based upon estoppel; nevertheless it is undoubtedly similar to estoppel, and some of the elements of estoppel must exist.

4. Waiver is bilateral. The parties to it act at the same moment. That is to say, they make a contract.

5. Neither a new agreement nor the elements of estoppel are required.

6. The expression "waiving a forfeiture" is incorrect. Election is the applicable doctrine; and the act is unilateral.

Having this clear comprehension of waiver, and of its value as a solvent of difficult problems, let us follow it into the insurance cases and see how it operates there.

Policies are crowded with numerous fine-type conditions, breach of any one of which "renders this policy void." And when a loss takes place the company frequently pleads (1) the existence, and

¹ *Croft v. Lumley*, 1858, 6 H. L. Cas. 705 (*per* Bramwell, B.). Approved in *Clough v. London, etc.*, 1871, L. R. 7 Ex. 35, in a judgment which was really written by Blackburn, J., see *Scarf v. Jardine*, 1882, 7 App. Cas. 360.

² *Warren v. Crane*, 1883, 50 Mich. 300. It must be "an intentional act with knowledge." — *Darnley v. London, etc.*, 1867, L. R. 2 H. L. 43. Approved in *Holdsworth v. Tucker*, 1887, 143 Mass. 374; *Hoxie v. Home, etc.*, 1864, 32 Conn. 40; *Montague v. Massey*, 1882, 76 Va. 314; *Findeisen v. Metropole, etc.*, 1885, 57 Vt. 524; see also *Bennecke v. Ins. Co.*, 1881, 105 U. S. 359. But see *Croft v. Lumley*, 1858, 6 H. L. Cas. 720, *contra*.

(2) the breach, of one of these conditions. This is supposed to be a perfectly good plea, and the plaintiff replies, and tries to prove some waiver by the company of either the condition or the breach of it. If he fails to prove waiver he is beaten.

All the cases proceed in this way, and it is my contention that they are all wrong. Demonstration of this assertion, moreover, I conceive to be an extremely simple task.

Let it be granted, as assumed basis of argument, that the word "void" in the policy really means "voidable at the election of the insurance company." Almost everybody agrees upon that point. Citations are unnecessary.

Very well. Now suppose that you are defending an insurance company, that the policy declares that if a certain condition is broken "the policy shall be void at the election of the insurance company," and that you are instructed to plead a breach of the condition, what will you say? Will you content yourself with asserting (1) the condition, and (2) the breach? No; for the breach did not affect the policy in the slightest. It gave to the company a right to terminate the policy, if the company chose to do so. And if the company did not so choose, and until the company did so choose, the contract remained unaffected. That seems to be reasonably clear. You must plead, then, not merely (1) the condition, and (2) the breach, but you must add (3) that the company elected to cancel the policy. If you do not, your plea is bad; for it alleges merely the occurrence of circumstances which enabled the company to terminate the policy, but it leaves unasserted that the policy was terminated.

The company may do as it likes, subject to this: that being given a choice between two things it cannot take both. But as a matter of practice, aided by current notions of law, it does take both. For example, default is made in payment of a premium, and the company has consequently a right to terminate the contract. But that is the very last thing it wants to do and will do. On the contrary, it will dun and humor the chap, and take something on account and notes for the balance, and threaten and sue, and attach, and worry, in order to get the premium and keep the assured as a future subscriber. And if a loss happens meanwhile? Well, that of course is a different thing. The policy says that if the premium is not paid "this policy shall be void"; and the premium was not paid; and is not that a good defense? According to present ideas it is, unless you can prove waiver.

The language almost always used in the authorities is that by the breach the policy was "forfeited." Then it is assumed that being "forfeited" the policy is at an end. And thus the conclusion, that unless the forfeiture can be got rid of in some way (by waiver for example) the company need not pay the loss. We must examine this a little; for although what has already been said appears to me to be conclusive, I am nevertheless very well aware that mental prepossessions do not easily yield to argument.

"Forfeiture"! What do we mean by "forfeiture"? A lease provides that upon non-payment of rent the lease shall be void. The lease is an onerous one; the tenant refuses to pay his rent; then he claims that he has "forfeited" his lease, that it is at an end, and that he is free. Of course he is wrong about his freedom; and is he right in saying that he had "forfeited" his lease? Not a bit of it. He has done nothing but refuse to pay his rent; and if the landlord should (because of the default) elect to terminate the lease, he (the tenant) has not only not forfeited anything, but is to some extent advantaged. Forfeiture usually implies loss, and we speak of relief against forfeitures, and feel that they are a hard, oppressive sort of thing which ought to be displaced if possible. But the luck of our jubilant tenant makes no appeal to our sympathy, and we feel that the word "forfeiture" is somewhat misapplied in his case. If the lease were one of some value, and the landlord elected to cancel, we might in very untechnical language say that the tenant had "forfeited" his lease. But clearly the word would not describe a legal situation, for his default in this case is precisely the same as his default in the other case, and yet there we saw that even untechnically the word could not be used. Technically, he has made default; that is all. If this is really "forfeiture," and if (as is assumed) "forfeiture" means termination of the lease, then of course the lease is ended. But that is not the case. The lease is in exactly the same position as it was before default, and it will remain so, unless the landlord chooses to elect otherwise.

Distinguish a little with this word "forfeiture." No objection need be made to the expressions "by this act he forfeited his life," "by re-marriage she forfeited her annuity." In such cases the implication is that there is some law, or some testamentary or other proviso, by which loss of life or loss of annuity is a necessary consequence of the act. We do not mean that the act has given some other person a choice as to the continuation or deter-

mination of the life or annuity. We mean that the act itself has caused the loss, and not that the option of some other person may possibly impose it. But when an insured has failed to file his proofs we do not say that he has forfeited the policy, because forfeiture is not a necessary consequence of the act, which at the most exposes him to the possibility that at some future time the insurer will so elect as to terminate the policy. It is not terminated, observe, by the act of the insured, nor at the time of his act, but by the election of another person and at a future time (although with relation back).

"I have spoken of the right of re-entry of a landlord as a 'forfeiture' of the lease, but the use of the word 'forfeiture' in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts, then the landlord may re-enter."¹

And if there is not, in landlord and tenant and insurance cases, any "forfeiture" by breach of condition (inserted for the benefit of the landlord or insurance company), there cannot of course be any "waiver of the forfeiture." For there is nothing to waive. Yet there is much authority to sustain such *dicta* as the following:—

"The doctrine of waiver seems applicable, properly speaking, only during the currency of the contract. . . . After a policy is forfeited I see not how it could be renewed or revived except by an express agreement of the insurers."²

"After thirty days had expired without any statement, nothing but the express agreement of the company could renew or revive the contract."³

If by breach of a condition a lease or a policy is "forfeited," and so terminated (whether the landlord or the tenant desired it or

¹ Barrow v. Isaacs, 1891, 1 Q. B. 417.

² Diehl v. Adams, etc., 1868, 58 Pa. St. 452; Carroll v. The Charter Oak Ins. Co., 38 Barb. (N. Y.) 402. And see Germania, etc., v. Klewer, 1889, 129 Ill. 599; Stephens v. Phoenix, etc., 1899, 85 Ill. App. 671; Home, etc., v. Kuhlman, 1899, 58 Neb. 493. In England "revivifying" a contract is spoken of as the *making of a new contract after the old one has been "forfeited"*; and a policy-holder failed in his action because an agent of the company had no authority to *make a bargain* binding the company to a new contract, on the terms of the old contract, but varying the time of payment: Acey v. Fernie, 1840, 7 M. & W. 150. Similarly in the law of landlord and tenant such language as "works a rehabilitation of the lease" is sometimes encountered: Dennison v. Maitland, 1891, 22 Ont. 172.

³ Beatty v. Lycoming, etc., 1870, 66 Pa. St. 9; Neill v. Union, etc., 1882, 7 Ont. App. 175.

not), then of course the legal relations thus ruptured could not be renewed or revived except by new agreement. But, by the breach, nothing has happened to these relations, and there is no necessity for renewal or revivification. There has been no "forfeiture," and there is therefore nothing to waive.

Perhaps as strong a case as could very well happen, involving the view of forfeiture and the necessity for revivification, went to the British Privy Council.¹ A marine policy provided that the ship should not be in the Gulf of St. Lawrence after November 15; it was wrecked in that gulf in December; the owners abandoned; and the insurers accepted abandonment and dealt with the ship.

"It was contended that the vessel was not insured at the time when she was lost, as the insurance did not extend to a loss in the Gulf of St. Lawrence after the 15th of November, and that an abandonment can be of no avail when there is no insurance. But the vessel was in fact insured; the loss occurred during the time and upon a voyage described in the policy; but there was a breach of one of the warranties or conditions expressed."

Observe that if it be argued that "after a policy is forfeited" it cannot be renewed or revived except by an express agreement of the insurers, the answer (in the case in hand) is that the policy never was forfeited; for the company, having a right to cancel it, elected not to do so. The judgment, however, does not proceed upon that principle. Very unsatisfactorily it declares that

"The effect of acceptance is . . . well expressed by Boulay Paty: '*Par leur acceptation volontaire il s'est fait un pacte entre les parties qui a tout terminé.*'"

In such cases, then, we cannot speak of "waiver of a forfeiture." Nor is it right to say that the insurer waives the condition or the breach of the condition. He has power to determine the contract or to continue it; and he exercises that power as he thinks best. And observe that his election to continue the contract, so far from being a waiver of the breach of the condition, has no effect whatever upon it. If a landlord elects not to re-enter because of non-repair according to contract, he does not "waive" the breach of contract; upon the contrary, he may sue upon it.² In no sense does he waive either the contract or its breach, for at the

¹ Provincial, etc., v. Leduc, 1874, L. R. 6 P. C. 224; 19 L. C. Jur. 281.

² Hartshorne v. Watson, 1838, 4 Bing. N. C. 178; Morecraft v. Meux, 1825, 4 B. & C. 606; Pellatt v. Boosey, 1862, 31 L. J. C. P. 283, *per* Erie, C. J.

same time that he elects not to re-enter because of the breach, he sues for damages. And as there has been no waiver of any "forfeiture" (for there was no forfeiture), so there has been no waiver at all.

It is not right even to say that the landlord or insurer waived his *right* to forfeit; for he did not. He had the right to choose between terminating the contract and continuing it; and he *exercised* that right of choice; he did not waive it, or give it up. If he had elected to determine the contract, no one would think of affirming that, by so doing, he had waived his right to continue it. And it is not more correct, when the election is to continue the contract, to say that he waived his right to determine it. If you have a choice between an apple and an orange, and you choose the orange, it would be rather absurd to say, either that you waived the apple, or your right to the apple (for you had none), or even your right to choose the apple (for you exercised your right by not choosing it).

One more suggestion. Rather than drop the word "waiver" altogether from these classes of cases, may we not say that there is waiver when the election is not to take advantage of the default? But waiver of what? Not of any forfeiture, because there is none. Not of the default, for it may still be sued upon. And not of the right to elect, for that has been exercised. And if "there is waiver," somebody must have waived. But in reality nothing has happened, and nothing has been done, except an election. If you choose to say that election to continue the contract is waiver of your right to determine it, say also that election to determine the contract is a waiver of your right to continue it. Then try it on the fruit, and explain that election in one direction means waiver in another. When you go to town you waive your right to stay at home.¹

I object to the substitution of waiver for election, for it fixes attention, not upon the act that it pretends to describe, but upon a mere consequence of that act. Election is the choice of the orange, and the consequence is that you do not get the apple. But there is no abandonment, or cession, or surrender, or waiver, of the apple, for you never had it, or any right to it. You had a right to choose; you exercised that right; you gave up, or threw

¹ The following language is common enough: "The doctrine of election of remedies applies, that, one having been chosen, all others are deemed waived." *Pratt v. Freeman*, 1902, 115 Wis. 648; 92 N. W. Rep. 368.

away, or waived nothing. The point of the act is the choice, and attention ought to be drawn to the thing chosen, and not exclusively fixed upon the effect of that choice.

The following language, too, is objectionable in the interest of clearness of conception of the true situation:

"The material inquiry is whether the defendant elected to exercise, or to waive, his right to take advantage of the forfeiture."¹

The existence of a right to elect is here acknowledged, but the underlying idea is that there has been a "forfeiture," and that if the forfeiture is not waived, it remains. Election does not determine what is to be done with a "forfeiture" situation, but whether there is to be any situation other than that which always existed. If "waiver" (in the connection in hand) be strictly limited to denote non-selection, and "waived" to mean "not selected," I shall withdraw objection to them, save upon the ground that having clumsy and forced meanings they will be sure to mislead us.

Some of the implications of the change here proposed are not only very striking, but will, it is hoped, be of great assistance to the courts in their struggle with some of the insurance companies. In the first place, silence strategy will no longer be available or beneficial to the companies. At present some courts say that breach of a condition is a forfeiture of the policy, and that a waiver of such forfeiture

"cannot be inferred from mere silence. It [the company] is not obliged to do or say anything to make a forfeiture effectual."² It may wait until claim is made under the policy, and then in denial thereof, or in defense of a suit commenced therefor, allege a forfeiture."³

And these courts are, at all events, consistent in this holding. If we assume that breach of a condition has "forfeited," in the sense of terminated, the policy, there can be no reason why the company should send notification of any sort to the insured. He knows of

¹ *Home v. Kuhlman*, 1899, 58 Neb. 488.

² What does that mean?

³ *Titus v. Glen's Falls, etc.*, 1880, 81 N. Y. 419. Approved in *Carson v. Home, etc.*, 1881, 53 Wis. 585; 11 N. W. Rep. 11. And see *Phoenix, etc., v. Stevenson*, 1879, 8 Ins. L. J. 922; *Schrimp v. Cedar Rapids, etc.*, 1882, 124 Ill. 354; *Smith v. St. Paul, etc.*, 1882, 3 Dak. 80; *Queen, etc., v. Young*, 1888, 86 Ala. 424; 28 So. Rep. 116; *Armstrong v. Agricultural, etc.*, 1892, 130 N. Y. 565; 29 N. E. Rep. 991; *Petit v. German, etc.*, 1898, 98 Fed. Rep. 800; *Banholzer v. New York, etc.*, 1898, 74 Minn. 387; *Parker v. Bankers, etc.*, 1899, 86 Ill. App. 315; *Manhattan, etc., v. Savage*, 1901, 23 Ky. 483; 63 S. W. Rep. 278.

the breach as well as the company (and usually better), and he knows that his contract is at an end. Then why tell him anything? Other courts are less consistent, but more nearly correct, when they declare that

"If the company contemplated the forfeiture of the policy because of the non-payment of the premium, it should at once have so declared, plainly and unconditionally."¹

For such language assumes that the breach has no effect upon the policy, and that its termination is the result of the company's election. That being so, the necessity for a declaration by the company is obvious. If the breach ended the policy, then, as we have said, the company could have nothing to communicate to the assured, for he knew of the breach and of its legal effect. But if it is the election of the company that is the important factor, then the company has something to communicate, something of great importance to the assured, something of which he can have no knowledge unless it is communicated to him by the company. The first effect, then, of the proposed change is that silence strategy will be as obsolete as flint muskets, and that the law last quoted will be upheld rather than that which supports the contrary view. If the company wants to cancel the policy it must do so. It cannot have a live policy for premium catching and a dead one for loss dodging.

A second effect is that a very difficult onus of proof is taken from the assured and placed where it ought to be. At present the company proves (1) the existence of the condition, and (2) its breach; and then the assured tries to prove waiver. Most of the courts, with true instinct, help him all they can, and find and infer waiver upon most scanty evidence, or even surmise. But very frequently the reply fails, for it is

"the duty of the plaintiff to establish the parol waiver by a clear preponderance of evidence."²

For the future waiver has not to be proved, for it is not a factor in the case, and there is no allegation of it in the pleadings. Observe that the company's plea now is (1) condition, (2) breach, and (3) election to cancel. To such a plea waiver is inapplicable, and

¹ *United States v. Lesser*, 1900, 126 Ala. 563; 28 So. Rep. 646; *Pollock v. German*, etc., 1901, 86 N. W. Rep. 1017 (Mich.).

² *McFarland v. Kittaning*, etc., 1890, 134 Pa. St. 590; *Gibson v. Liverpool*, etc., 1902, 159 N. Y. 419.

the reply is a mere joinder of issue. The onus, therefore, instead of being on the plaintiff to prove waiver, is on the company to prove election. And the company must prove election with all its legal requisites as to time, communication, etc. Any conduct of the company which formerly the plaintiff would have shown in support of his waiver contention, he now gives (in rebuttal) in traverse of the company's alleged election to cancel the policy.

This is a very important point; for it may be very confidently asserted that companies would have found themselves unable to prove election to terminate in one case out of a hundred of those which they have defended. What they will do in the future may be surmised, but their current practice, at all events, will not help them to prove election. They are at present much more successful in criticising evidence of waiver than they would be in proving that they did what we all know they never do, save in extreme cases.

A third effect of the proposed change, and one of hardly less value than those already noted, has reference to the authority of agents of the company. At present the assured has to prove, not merely that somebody did something which if done by the company would be held to be a waiver, but that that person was acting under the authority of the company. And this is where he too frequently fails; not because the actor had not ample authority, but because the company denies it and the assured is unable to prove it. For the future the onus is changed, and the company must prove, not only that somebody did something which would be an election if done by the company, but that such person was acting under the authority of the company. They will not of course have much difficulty in doing so, for companies can always prove authority when they want to. But they will be deprived of their great tactical advantage by the removal of the onus as to the agent's authority from the shoulders of the assured. They must now prove authority to elect, and will not escape because the assured fails to prove authority to waive.

These three effects of the proposed change follow naturally and inevitably upon its adoption. A possible fourth is open to controversy.

Suppose that an apprenticeship agreement provides for payment by the apprentice of a present premium for five years' service and tuition, for earlier termination of the contractual relations at the election of the master, and says nothing as to return of part of the premium in that event, has the apprentice a right to demand

proportionate repayment in case his tuition ceases by exercise of the master's election at the end of a week? The authorities declare clearly enough in his favor. And suppose that a shipowner insures his fleet for three years, that he pays the premium in advance, that the contract provides that in case of war the company may elect to terminate the contract, and that nothing is said as to partial return of the premium, has not the insured a valid claim to part of it, in case of war and election to terminate at the end of the first month? And is the law otherwise if the right to elect arises upon the act of the assured rather than upon the occurrence of some public event? For example, a policy provides that the company shall have a right to terminate it if further insurance is placed upon the property, and the company exercises this right and terminates the policy before it has run a fortnight; can the company nevertheless retain the three years' premium?

Take the case a step further: Suppose that the election arises upon the doing of some act by the assured which he covenanted not to do; for example, he brought upon the premises a barrel of gunpowder in spite of his agreement to the contrary. But remember that this act had no effect other than to give to the company a right to terminate the policy, — a right which it would probably not exercise before the happening of a loss (rather it would endeavor to procure the removal of the powder), whatever it might be inclined to do afterwards.

Of course, if the apprentice declined to remain with his master and receive further instruction, he could not demand repayment of any part of the premium. And if a policy-holder had power to cancel it and did so, the company might be entitled to retain the whole amount. But the question we have in hand is whether the company may terminate its risk and yet keep the premium. It is said that

"The general rule is that if a risk never attaches under a policy, the premium is not earned, and if paid may be recovered, unless the insured has been guilty of fraud." But "if the risk attached and the policy became void subsequently, through the conduct of the insured, no part of the premium can be recovered."¹

¹ *Ins. Co. v. Smith*, 1899, 34 C. C. A. 506; 92 Fed. Rep. 503. And see *Colby v. Cedar Rapids, etc.*, 1885, 66 Ia. 577; 24 N. W. Rep. 54; *Phoenix, etc., v. Stevenson*, 1879, 78 Ky. 161; *Schrimp v. Cedar, etc.*, 1888, 124 Ill. 354; 16 N. E. Rep. 229; *Farmer's, etc., v. Home*, 1898, 54 Neb. 740; *Home, etc., v. Kuhlman*, 1899, 58 Nev. 488; *Georgia, etc., v. Rosenfield*, 1899, 37 C. C. A. 101.

That may be perfectly true. But we are discussing a case in which the policy does not become void "through the conduct of the insured," but at the election of the company. Solution of the trouble cannot, and need not, be undertaken at present. Many distinctions and analogies are involved. The French law is thus stated,¹ and it deserves consideration :

"La prime étant le prix de l'assurance, son taux devrait varier chaque année: il tombe sous le sens qu'au fur et à mesure qu'une personne vieillit ses chances de mortalité vont en augmentant. Néanmoins et à juste titre, car dans les dernières années le chiffre aurait pu être excessif, il a paru plus pratique et plus rationnel de ne pas tenir compte des différences qui se produisent d'année en année et de rendre la prime uniforme. On reporte sur les premières années une partie de ce qui serait à payer pour les dernières, en prenant la moyenne des chiffres donnés par toutes les primes prévues pour l'assurance vie entière et indiquées par les tables de mortalité. Ce chiffre de la prime uniformisée comprend deux parties: l'une correspond à la prime simple d'assurance pour l'année, l'autre est destinée à parfaire l'insuffisance des primes futures, c'est ce qui constitue la réserve."²

"Quand, pour une raison ou pour une autre, l'assuré arrête le contrat, l'assureur a le droit incontestable de conserver la somme représentant la prime pour chacune des années écoulées, mais il ne peut pas retenir d'une façon absolue la réserve, puisque cette réserve se rapporte à des années durant lesquelles lui, assureur, ne sera nullement engagé. Quand une personne traite pour une assurance sur la vie avec une Compagnie, cette dernière lui ouvre un compte, compte qui comprend deux éléments: la prime simple due chaque année; la somme destinée à parfaire l'insuffisance des primes futures. Si l'assuré se retire, il faut liquider cette situation: la compagnie doit rembourser le solde créditeur,³ mais nullement quoiqu'il ait pu être soutenu,⁴ dans son intégralité: pendant tout le temps qu'a duré le contrat, elle a eu à supporter des frais généraux, frais que motivait la par-

¹ Lefort: *Contrat d'assurance sur la vie*, III. 18.

² Couteau: *op. cit.* T. II. 294.

³ C'est là une différence essentielle avec l'assurance contre l'incendie: quand une police de se genre a été résiliée, l'assuré n'a rien à réclamer pour les primes par lui versées parce que les primes encaissées sont l'exacte contre-partie du risque couru. — V. Dormoy: *Théorie mathém. des Assur. sur la vie*, T. II. p. 79. (There is in this respect an essential difference in cases of insurance against fire: when a policy of that kind has been cancelled the assured has no claim to the premiums paid by him, because these are the exact equivalent of the risk run.)

⁴ V. Laurent: *Les Compagnies d'assurances sur la vie humaine*. (La Réforme économique, 1875): de Serbonnes: des contrats discontinués (*Monit. des assur.* 1875, p. 429); Cook: *La valeur de rachat* (*Ibid.* 1877, p. 87). Cf. Dormoy: *op. cit.* p. 79; Karup: *Theoretisches Handbuch des Lebensversicherung*, T. III. p. 135.

ticipation de l'assuré, et dont il ne saurait s'exonérer en excipant de son départ, la compagnie n'étant pas un mandataire chargé de faire gratuitement les affaires de leur clientèle.¹”²

Before closing let an objection to the main argument of this article be answered. Suppose that a breach of the policy takes place during its currency, but that the company does not hear of it until after the loss, would not the conventional defense be a good one, namely (1) the condition, and (2) the breach? For example, suppose that the condition forbade gunpowder on the premises, that the gunpowder was brought there, that its presence was successfully concealed from the company until after the loss; in such a case how is the company going to defend itself upon the plea of election? It could not elect because it knew nothing of the breach. For answer let it be said that whatever our difficulties we must not alter the contract. The policy says that breach of any condition “renders this policy void at the election of the company”; it cannot become void unless the company so elects; and there-

¹ De Courcy : Précis de l'assurance sur la vie, p. 289. Ce prélèvement est destiné à couvrir les dépenses générales de l'entreprise et à procurer un bénéfice suffisamment rémunérateur aux capitaux qui y sont engagés. *Conf.* : Des entreprises d'assurances sur la vie (L'Opinion, Avril, 1870, p. 55). (This assessment is destined to cover the general expenses of the enterprise, and to procure a sufficiently remunerative return upon the capital engaged in it.)

² “The premium being the price of the insurance, its amount must vary each year : for the reason that in the measure that a person grows old his chances of death are increased. Nevertheless, and rightly so, for in the last years the figure would be excessive, it appears to be more practical and more rational not to take into account the differences which are produced from year to year and to render the premium uniform. We carry back the part of that which is paid in the last years to the first year, and take the mean of the figures given by all the premiums provided for the entire life insured and indicated by the tables of mortality. The amount of the premium thus made uniform comprises two parts : the one corresponds to the simple premium of insurance for the year ; the other is destined to equalize the insufficiency of the future premiums. It is this which constitutes the reserve. When for one reason or another the assured puts an end to the contract, the insurer has the incontestable right to keep the sum representing the premium for each of the years already past, but he cannot retain in absolute fashion the reserve, since this reserve has relation to the years during which the assurer will not be under obligation. When a person agrees for a life insurance with a company, the company opens with him an account which comprises two elements : the simple premium due each year ; the sum destined to equalize the insufficiency of the future premiums. If the assured withdraws, it is necessary to liquidate this situation : the company ought to reimburse the amount at the credit of the account ; but not in its entirety, although it might have been exhausted (by liabilities of the company?). During all the time that the contract was in force the company had to pay its general charges which induced the participation of the assured and from which he cannot exonerate himself by indicating his departure, the company not being a mandatory charged with transacting gratuitously the affairs of their customers.”

fore the company must succeed upon the ground of election or not at all.

And the company is not in any difficulty. Election to terminate may be made within a reasonable time after knowledge of the facts. "Yes," you say, "but how will it help the company to terminate the contract after the loss has happened?" To which I reply: The fact of loss cannot take away or affect the right of election given by the contract. There are scores of cases in which the breach itself occurs after the loss (*e. g.* failure to furnish proofs). Moreover, it must not be imagined that termination of the contract dates from the time of election. It dates from the breach. Look at the contract. It says that a certain act shall void the policy, — if the company so says. The company does so say. Say what? That the *act* voids the policy. When did the act void the policy? At the only time it could do so, namely, when it occurred. Observe that whether the act has voided the policy is a matter for the company's election. What the company elects is that a certain act shall or shall not have a certain effect, or, in other words, that the language of the contract shall or shall not have its operative effect. The company does not change the contract. It says: We elect that the voidance clause shall operate.¹

Some time ago I commenced the compilation of a treatise on "waiver." The subject has, however, proved to be of most illusive character. In insurance law, in landlord and tenant, and in other important departments in which waiver has been commonly supposed to have extensive operation, it has steadily receded before close analysis. The book may change its title before it is published.

John S. Ewart.

OTTAWA, CANADA.

¹ Election to abandon a wreck to the company in which it is insured "is retrospective, operating from the moment of the casualty." Arnould, *Marine Ins.*, 1901, § 1205.

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APPLICATION OF THE RULE AGAINST PERPETUITIES TO OPTIONS TO PURCHASE. — According to the most satisfactory statement of the rule against perpetuities, no interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.¹ Consequently, the English courts have held that a covenant by a landowner giving the covenantee the option of purchasing his land at any future time is void as creating a perpetuity,² and the Chancery Division has recently decided that a covenant in a lease for ninety-nine years that the lessee may purchase the fee at any time during the term is obnoxious to the rule. *Woodall v. Clifton*, 39 Law Jour. 644.

It may be objected that these results are opposed on principle to the well-established English doctrine which exempts covenants for perpetual renewal in leases from the operation of the rule against perpetuities.³ Of the many suggestions which have been advanced to explain this exemption,⁴ the most noteworthy is that the covenant is part of the lessee's present interest, and the right of a present possessor of land to continue or drop his interest is not a right subject to a condition precedent.⁵ This explanation, however, while sufficient in the case of an absolute covenant to renew, is not equally satisfactory when the right to renewal is limited to arise only upon giving notice within a particular time and paying a specified fine.⁶ Such stipula-

¹ Gray, Rule against Perpetuities § 201.

² London, etc., *Railway v. Gomm*, 20 Ch. D. 562.

³ *Hare v. Burges*, 4 Kay and J. 45.

⁴ See 13 HARV. L. REV. 472, 482.

⁵ Gray, Rule against Perpetuities § 230.

⁶ 42 Sol. Jour. 628.

tions, as well as other requirements establishing conditions precedent to the right of the covenantee, are common and are held not to invalidate the covenants.⁷ On the whole, it would seem that the doctrine of exempting covenants for perpetual renewal from the application of the rule against perpetuities must be regarded as a pure exception.⁸ Indeed, some American courts have refused to recognize it.⁹ It is impossible, therefore, to argue from this exceptional doctrine as a basis. A covenant to convey a fee at a remote time clearly creates an interest in land. That interest is subject, however, to the condition that the covenantee shall elect to take a conveyance of the fee; and if the covenant permits the condition to be fulfilled at too remote a time, the rule against perpetuities is infringed. It is well settled that to be valid an executory interest in a legal estate created by means of a shifting or springing use must be so limited that it must necessarily take effect, if at all, within the period required by the rule.¹⁰ In the case of the covenant to convey there is a springing limitation of the equitable estate, since upon the election of the covenantee to purchase, the equitable estate passes from the covenantor and vests in him; and if such a limitation of the legal estate by way of springing or shifting use is void, it is hard to escape the conclusion that the same must be true in the case of the equitable estate. In other words, there is no difference, for the purposes which the rule against perpetuities is designed to accomplish, between an option to purchase and what is called a conditional limitation; and both must take effect within the time required by that rule.

RIGHTS RESULTING FROM ADVERSE POSSESSION OF ONE CLAIMING LESS THAN THE FEE. — An adverse possessor usually claims the fee; but in some cases he admits the title of a third party, while disputing that of the real owner. In such cases the question arises as to whether he acquires title for himself against all the world by virtue of a possession adverse to the true owner. It is settled in cases where one enters as life tenant under a void will and remains for the statutory period that the true owner is barred, but that the life tenant and his privies cannot dispute the title in fee simple of the remainder man under the will.¹ The same rule holds in the case of one who enters as life tenant under a deed from a grantor who has no title.² An interesting extension of the doctrine to be deduced from these cases is suggested by a case decided a short time ago in Minnesota. The defendant entered the plaintiff's land thinking that it belonged to the United States and meaning to acquire a homestead. He remained in possession longer than the statutory period, when the plaintiff attempted to eject him. The court held that the plaintiff was barred, and intimated that the defendant had acquired the fee. *Maas v. Burdetzke*, 101 N. W. Rep. 182.

Two theories have been advanced to explain these cases. One is that the adverse possessor is estopped from denying the title of the one under whom he has been claiming. The other is that the adverse possessor is

⁷ See *Finch v. Underwood*, 2 Ch. D. 310; *Sweet v. Anderson*, 2 Bro. P. C. 256.

⁸ See *London, etc., Railway v. Gomm*, *supra*.

⁹ *Morrison v. Rossignol*, 5 Cal. 64.

¹⁰ Sug. Gilb. Uses, 3rd ed., 156, 157.

¹ *Board v. Board*, L. R. 9 Q. B. 48.

² *Dalton v. Fitzgerald*, [1897] 1 Ch. 440.

analogous to a tortious feoffee, and that the tort may be cured by lapse of time. When cured it leaves the adverse possessor with a clear right to just what he claimed. If he claimed that the fee was in some person other than the true owner, the latter would be barred, and the fee would be in the third person. If the defendant in the principal case filed the usual homestead application and received permission to enter from the government, he would be a mere licensee and could not on either theory dispute the title of the United States. Assuming, however, that he entered without the knowledge or permission of the government, would the mere recognition that it owned the fee be sufficient on either theory to pass the title to the government? The only possible estoppel is *in pais*. This form of estoppel arises out of either contract or conduct.³ Clearly no contract basis exists here, and to create an estoppel from conduct it is essential that one party should have so acted on a representation of the other that it will be a detriment to him to allow the falsity of the representation to be asserted. If there was no relation between the parties, no basis for an estoppel can be found, and the adverse possessor would hold the fee. On the other theory, however, the adverse possessor would get by lapse of time no more than he claimed, which was not the fee, but a right to acquire a homestead patent. Under a regulation of the homestead laws he has lost that right here. As he has claimed for the statutory period that the fee is in the United States, it would, under this theory, acquire the fee, — a result most surprising from a practical standpoint.

COURT'S DISCRETION TO EXCLUDE CUMULATIVE EVIDENCE. — As to how far a judge may exercise his discretion in a jury trial to exclude relevant evidence on the ground that it is merely cumulative, there is a great conflict of opinion except in two classes of cases. It is the uniform rule that expert evidence should be confined within reasonable bounds. From its very nature an indefinite number of witnesses might otherwise be called, each necessitating so much additional expense, vexation, and delay in demonstrating his competency and presenting his theory. Moreover, while expert witnesses may agree as to essentials, they are very apt to differ upon minor matters. These little discrepancies grow in importance with continued repetition until the juror's mind, seizing upon them as the essentials, distrusts all expert testimony as inherently uncertain. Consequently the trial court has been uniformly allowed to exercise discretionary power in limiting the introduction of such testimony.¹ Likewise, when evidence is introduced to prove character or usage, the same rule applies, for if the best witnesses are not believed, others can hardly be hoped to produce conviction.²

In all other cases there is an utter lack of harmony. On the one hand, it is contended that such exclusion may render difficult the task of establishing the point in controversy. On the other, it is argued that the time and energy of the court should not be consumed in hearing and sifting an unending mass of evidence, which has little or no probative value. Influenced by these conflicting motives, different jurisdictions have adopted

³ Bigelow, Estoppel, 5th ed., 455.

¹ *Fraser v. Jennison*, 42 Mich. 206.

² *Bonnell v. Butler*, 23 Conn. 64, 69.

widely varying rules as to the judge's power of exclusion. Statutes in several states provide that cumulative evidence may be rejected when the issue to which it relates has been settled beyond a reasonable doubt.³ Such a rule is obviously undesirable in that it compels the judge to pass upon questions of fact before they go to the jury. In some jurisdictions, cumulative evidence may be rejected upon collateral issues, but not upon the main issue.⁴ This distinction is clearly unsound, since the reason for rejecting such evidence is that its evil effects outweigh its probative value. In others, the court is denied all power of exclusion except when the fact sought to be established is not controverted.⁵ A recent Massachusetts case supports this view, holding that evidence should not be excluded on the ground that testimony already introduced, if believed, amounts to proof. *Perkins v. Rice*, 72 N. E. Rep. 323. This rule ignores the fact that the probative value of evidence, merely cumulative in its nature, may be far outweighed by its disadvantages in expense, delay, and confusion to the minds of the jury. The rule which undoubtedly meets with the greatest favor gives the trial judge a discretionary power of exclusion subject to review by the upper court.⁶ Upon principle, too, this seems to present the most satisfactory method of procedure, for it tends to keep down the expenses of litigation, prevents the accumulation of a confused mass of evidence from which it is difficult to sift the truth, and secures to the parties a mode of redress in case of possible error.

THE VICE-PRINCIPAL DOCTRINE. — Whatever may be the basis of the fellow-servant doctrine, — whether that doctrine is an application of the general rule that one man is not liable for the torts of another, or is an exception to the principle of *respondeat superior*, — the courts in applying it almost universally rest their decisions upon the theory of assumption of risk. Among the risks which a servant takes upon himself as incident to the employment is that of injury from the negligence of fellow-servants; but risks arising from the negligence of the master he does not assume.¹ As to how far he assumes the risk arising from the negligence of one standing in the master's place, there is a conflict of opinion. By the "superior servant" doctrine, formulated in Ohio,² an employee assumes no risk of injury from the negligence of any servant who has control over him. Accordingly the master is liable for injury to a servant resulting from the negligence of the superior servant in doing any act or giving any order within the scope of his authority even though it pertain to some detail in the operation of the business.

Although the courts of several states³ and the United States Supreme Court⁴ approved this view, New York adopted as the true test of the master's liability, not the rank of the negligent servant, but the character of the negligent act.⁵ The master owes to the servant certain duties which he dele-

³ Cal. Code Civ. Pro. § 2044.

⁴ *Fisher v. Conway*, 21 Kan. 18, 24.

⁵ *Abenheim v. Samuels*, 5 N. Y. Supp. 117.

⁶ *Hupp v. Baring*, 8 Oh. C. Ct. 259; *State v. Whitton*, 68 Mo. 91.

¹ *Farwell v. Boston & Worcester R. R.*, 4 Met. (Mass.) 49. In England and several of our states employers' liability has been largely extended by statute.

² *Little Miami R. Co. v. Stevens*, 20 Oh. 415.

³ *Walker v. Gillett*, 59 Kan. 214.

⁴ *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377.

⁵ *Crispin v. Babbitt*, 81 N. Y. 516.

gates at his peril. Any servant, of whatever rank, entrusted with the performance of these duties is a vice-principal, and no servant is a vice-principal simply on account of his rank. The master is therefore not liable for the negligent act of a servant in matters of detail in conducting the business. For example, it is a master's duty to supply safe appliances, but under some conditions it is part of the servants' work to construct the appliance from materials supplied by the master. In such a case his liability ends when he supplies sound materials. Thus the construction of temporary scaffolding, to be shifted as the erection of the building progresses, has been held a part of the servants' work.⁶ Therefore a master is not liable for injury resulting from negligent construction, even though the injured servant was doing a different class of work from that of the delinquent servant. *Hempstock v. Lackawanna Iron and Steel Co.*, 90 N. Y. Supp. 663.

The New York theory is at present accepted by the United States Supreme Court⁷ and by the great weight of authority.⁸ Some courts, however, apply it with a limitation closely akin to the "superior servant" doctrine. They hold that a general manager or head of a department, to whom the master has delegated all his functions, is a vice-principal by virtue merely of his official position.⁹ This exception seems on principle to be unwarranted. No reason appears why official position, if made the test under these particular circumstances, should not be extended to the case of every superior servant. This exception should stand on the same footing with the "superior servant" doctrine, which is far less satisfactory than the theory which makes the character of the negligent act the test. There would seem to be no reason for contending that a servant did not assume the risk of a negligent act solely because it was done by his superior. On the other hand, if the act was done in the performance of a duty not delegable by the master, the injured servant did not assume the risk of injury from such an act, whether done by a servant superior or inferior in rank to himself.

ABANDONMENT AND SUBROGATION IN MARINE INSURANCE.—When a ship is injured by a wrongdoer, if the insurer accepts an abandonment of it and pays as if there had been a total loss, he is given a claim upon the right of action which the insured has against the wrongdoer. This claim has been explained in two ways. The leading English case,¹ although its decision is consistent with either theory, supports the view that the abandonment carries with it the money claim against the tort-feasor as an equivalent of the *spes recuperandi*. There are American opinions to the same effect.² On the other hand, it has been suggested that the insurer's claim rests upon the principle that in all contracts of indemnity anything coming into the hands of the insured, which reduces the loss, becomes subject to an equity in favor of an indemnifier who has already paid.³ Usually either theory would permit the same decision, but in a recent case a choice

⁶ *Beesley v. Wheeler & Co.*, 103 Mich. 196.

⁷ *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368.

⁸ *Fox v. Spring Lake Iron Co.*, 89 Mich. 387.

⁹ *Quincy, etc., Co. v. Kitts*, 42 Mich. 34.

¹ *North of Eng., etc., Ass'n v. Armstrong*, L. R. 5 Q. B. 244.

² *Comegys v. Vase*, 1 Pet. (U. S.) 193.

³ *Burnard v. Rodocanachi*, 7 App. Cas. 333, *per* Lord Blackburn.

between them was made imperative. The insured under a valued policy abandoned the ship and collected the insurance. Later he recovered a larger amount from the one who had caused the loss. By the first theory this entire amount would go to the insurer; but the court adopted the second view, and allowed the insurer only what he had paid the insured. *The Livingstone*, 130 Fed. Rep. 746 (C. C. A., Second Circ.).

The correctness of the first theory depends upon the effect of the abandonment of a ship. There is nothing in its nature which makes it different from the abandonment of any other property. When accepted by the insurer it makes him the owner of the ship and entitles him to all rights incident to the property, for example, the right to freight not earned before the completion of the voyage.⁴ But it does not give him rights not incident to his ownership, such as the right to freight earned either *pro rata* or by delivery of part of the cargo before the casualty.⁵ The claim against the tort-feasor did not arise from the violation of a right, incident to the insurer's ownership. The tort-feasor did no damage to the property after the insurer became the owner. This claim, then, differs in nature from the *spes recuperandi* with which it is so often confounded⁶ and from all other claims which are based upon the ownership of property transferred by the abandonment. It would seem, therefore, that the origin of the insurer's claim to the money recovered from the tort-feasor must be explained on the theory of subrogation.

There seems to be nothing in the nature of a valued policy to prevent the application of principles of subrogation. The mere fact that it is valued does not change its nature as a contract of indemnity. That simply fixes the amount which as between the insurer and insured shall be taken as the valuation in case of total loss. Consequently the insured, when paid this amount, cannot complain if the insurer is given all sums recovered up to the amount of the valuation, no matter what is the real value of the ship. But since the only reason the insurer has any claim upon the sums recovered by the insured is that he has paid for a loss which later is otherwise recompensed, it is obvious that his claim must be commensurate with the amount paid and must be satisfied when that amount is returned. It is not a violation of equitable principles for the insured to receive a full recompense even though that recompense exceed a valuation which he had previously made; and, in any case, it is difficult to see how the insurer, fully recouped, can have any claim for the excess.

IMPOSSIBILITY BY LAW AS EXCUSE FOR BREACH OF CONTRACT. — Of the grounds commonly recognized as affording a defense to actions upon contract, none is more clearly established than impossibility by operation of domestic law. The rule governing these cases has been applied where the promisor has been prevented from lawfully carrying out his obligation by the acts of the executive branch of the government as well as where the impossibility is due to subsequent legislative enactments.¹

⁴ *Mason v. Marine Ins. Co.*, 110 Fed. Rep. 452.

⁵ *Red Sea*, [1896] P. 20.

⁶ *Rogers v. Hosack's Executors*, 18 Wend. (N. Y.) 319.

¹ *Touteng v. Hubbard*, 3 Bos. & Pul. 291; *Cordes v. Miller*, 39 Mich. 581; *Baily v. De Cr spigny*, L. R. 4 Q. B. 180.

Where the law has intervened to make performance of the contract impossible, the promisor is excused primarily on grounds of public policy, and not from any notion of indulgence. The rule is generally recognized, that a contract for an illegal object is void on its face; and the time fixed for performance is plainly the time at which the legality of the object is finally to be determined. Clearly, then, it is immaterial whether or not the promisor might have anticipated that the thing which he has promised to do, and which was lawful at the time he contracted, would subsequently become unlawful.² The absolute, arbitrary bar to the enforcement of the contract is present, irrespective of the intention or knowledge of the parties. In cases where the element of illegality is not present, because the defense interposed is impossibility due to foreign, as distinguished from domestic, law, the courts have generally refused to excuse the promisor.³

In contracts where performance has become impossible in fact, however, the defense is in its nature equitable, resting upon the injustice of enforcing an absolute legal obligation under all circumstances;⁴ and if the impossibility might have been foreseen by the promisor, the equitable grounds upon which he claims relief must fail.⁵ The importance of this distinction between impossibility in fact and impossibility in law is illustrated by a case lately decided in the United States Supreme Court. During the war between China and Japan a carrier contracted to transport copper from New York to Yokohama. The government official at Tacoma, however, refused to clear the vessel carrying the copper, on the ground that as contraband it could not legally be exported to Japan. The ship accordingly sailed without it. The following day it appeared that there was no legal objection to the exportation. It was held that the mistake of the official was no defense to the carrier in view of circumstances showing that it had taken the risk of any trouble arising from the nature of the goods. *Northern Pacific Railway Co. v. American Trading Co.*, 25 Sup. Ct. Rep. 84. Although the agent of the government had acted within the scope of his employment, that fact could not operate to give validity to his unauthorized act, and the breach of the contract was not due strictly to the operation of law. Consequently, since the principles of public policy upon which an illegal contract is declared void, did not apply, the promisor had no absolute defense. The case was, accordingly, determined upon the same principles as cases presenting a supervening impossibility of fact, with emphasis placed upon the assumption of risk by the promisor. Thus, if the official abuse of discretion could not have been anticipated, one so prevented from performing should have been protected. Where the defense interposed is impossibility due to foreign law, there is a situation closely analogous, and it would seem that the result should be worked out along the same equitable lines.⁶

EXEMPTION OF MUNICIPAL PROPERTY FROM STATE TAXATION. — A municipality being, within its territory, an agency of the state for the exercise of governmental functions, a general rule of exemption excludes prop-

² Cf. *Esposito v. Bowden*, 7 E. & B. 763, 789, 790.

³ *Barker v. Hodgson*, 3 M. & S. 267; *Blight v. Page*, 3 Bos. & Pul. 295, note a; *Tweedie Trading Co. v. McDonald Co.*, 114 Fed. Rep. 985.

⁴ 15 HARV. L. REV. 418.

⁵ *Jennings v. Lyons*, 39 Wis. 553; *Bryan v. Spurgin*, 5 Sneed (Tenn.) 681.

⁶ See 16 HARV. L. REV. 64.

erty held by a city for governmental purposes from state taxation, to avoid the inconsistency of the state taxing itself.¹ Accordingly, such instrumentalities of well-recognized governmental functions as city halls and court houses are nowhere taxed. Changed economic conditions, however, have enlarged the domain of municipal enterprise, and the state has seen fit to confer added power upon its municipalities. Parks, aqueducts, wharves, waterworks and lighting plants have become legitimate objects of municipal ownership; and the question arises whether such property is held for governmental purposes within the meaning of the rule of exemption. A distinction has been taken by some courts, and exemption denied to property held by a city merely for the "profit and convenience of its citizens."² In applying this limitation, the Court of Appeals of Kentucky lately refused to exempt bonds of a gas company acquired by the city of Frankfort in exchange for its gas plant, although the income from the bonds was used for lighting the streets. *City of Frankfort v. Commonwealth*, 82 S. E. Rep. 1008. A previous decision of the same court exempting a public park is distinguished on the ground that the city derived no revenue from its park.³ It would seem, however, that the profit and convenience of the citizens of a particular community are quite as much the sole objects of a public park as of street lamps. Moreover, the city has constitutional authority to provide for street lighting. It would hardly be urged that taxes directly levied for that purpose are taxable by the commonwealth, and the means of effectuating such an object should be regulated only by the test of reasonableness.

The majority of jurisdictions have taken a broader view, and, therefore, in the absence of special statutes, municipal waterworks and lighting plants, though yielding revenue, are exempt from taxation.⁴ The collection of water-rents is generally considered, not a source of private profit, but a mode of taxation.⁵ To the extent that a municipality is given enlarged power to acquire and engage in industries directly for the public benefit, it is regarded as invested with so much more governmental power, in the broader meaning of the term.⁶ Whatever property it acquires through taxation is exempt;⁷ for, obviously, the product of one tax should not be made the subject of another. The power to levy taxes is based on the right of governmental administration and public welfare.⁸ Only public purposes justify the levying of a tax, and the same test as to what constitutes public purposes should be applied in exempting property from taxation as in levying taxes for the purpose of acquiring it.

RIGHT OF INSPECTION IN SALES C. O. D. — Under ordinary circumstances, when a vendor sells and ships goods of a specified description, the vendee clearly has the right of inspection before acceptance.¹ If the goods

¹ 1 Cooley, Taxation, 3d ed., 263 *et seq.*

² *City of Louisville v. Commonwealth*, 1 Duv. (Ky.) 295.

³ *Cf. City of Owensboro v. Commonwealth*, 105 Ky. 344; *Rochester v. Rush*, 80 N. Y. 302.

⁴ *Town of West Hartford v. Water Com'r*, 44 Conn. 360; *State v. Toledo*, 54 Oh. St. 418; *Smith v. Mayor of Nashville*, 88 Tenn. 464; *Sumner County v. Wellington*, 66 Kan. 590; *contra, City of Covington v. Commonwealth*, 19 Ky. Law Rep. 105.

⁵ *Springfield, etc., Co. v. Keeseville*, 148 N. Y. 46.

⁶ See *Town of West Hartford v. Water Com'r*, *supra*; *Rochester v. Rush*, *supra*.

⁷ *State v. Toledo*, *supra*.

⁸ See *People v. Salem*, 20 Mich. 452.

¹ *Isherwood v. Whitmore*, 11 M. & W. 347.

are according to order, title passes at the moment of shipment and the purchaser is bound to pay the price.² If they do not fulfill the required conditions, the buyer need not accept them and there is no sale.³ But when goods are shipped C. O. D., do the same rules apply? According to the better opinion, the condition of collection on delivery does not prevent the passing of title, though it denies the vendee the right of possession.⁴ As to its effect upon the right of inspection, however, the few authorities are in confusion. On the one hand, it has been held that a carrier incurs no liability to the consignee for refusal to allow inspection.⁵ On the other hand, an express company which allowed inspection was held not liable in an action by the vendor.⁶ In this case the company had delivered the goods to the consignee upon deposit of the purchase price, and had agreed to return the deposit if the goods proved unsatisfactory. Upon the hypothesis that the vendee had a right of inspection, the court reasoned that the carrier should be protected in permitting a reasonable exercise thereof. The question, however, is squarely raised only in actions between the vendor and the vendee. In a Kentucky case where goods were sent C. O. D. without the consignee's authority for so transmitting them, the court diplomatically left it for the jury to determine whether there was a right of inspection.⁷ A recent Michigan case raised the question incidentally, the court taking the position that a valid tender could not be made without such a right. *Thick v. Detroit, etc., R. R. Co.*, 101 N. W. Rep. 64.

As this utter lack of harmony prevails among the authorities, it may well be asked, what result should be reached on principle. There is a general rule among express companies not to allow inspection of goods sent C. O. D.; and in cases where this method of shipment is contemplated, the parties might well be taken to have agreed that this rule should form part of the contract.⁸ After payments were made and the goods obtained, if they should prove not to be in accordance with the order, the buyer would have the usual remedies for the breach of the implied warranty that the goods conformed to the description. In some jurisdictions, he could sue only for damages; in others, he would be allowed the option of rescission or damages.⁹ On principle, he clearly should have this option, since he had no opportunity to inspect.¹⁰ But if the vendee had not authorized the shipment of goods C. O. D., he could not be taken to have contracted with reference to the rule of the carrier, his right of inspection would remain, and such a consignment ought not to constitute a valid tender.

DECLARATIONS OF TESTAMENTARY INTENTION. — As between an ante-testamentary declaration by a testator of his intention to dispose of his property in a certain way, and his post-testamentary declaration of the fact of such disposition, it is obvious that neither is entitled to a higher degree of credibility than the other. Nevertheless, the former was at first admitted in

² *Dutton v. Solomonson*, 3 Bos. & Pul. 582.

³ *Lambden v. Hill*, 6 Houst. (Del.) 29.

⁴ *Commonwealth v. Fleming*, 130 Pa. St. 138.

⁵ *Wiltse v. Barnes*, 46 Ia. 210; see *Lane v. Chadwick*, 146 Mass. 68.

⁶ *Lyons & Co. v. Hill & Co.*, 46 N. H. 49.

⁷ *Louisville Lithographic Co. v. Schedler*, 23 Ky. Law Rep. 465.

⁸ See *Stevenson, Jaques & Co. v. McLean*, 5 Q. B. D. 346, 349.

⁹ *Pope v. Allis*, 115 U. S. 363. ¹⁰ See 16 HARV. L. REV. 465 ff.

evidence as a declaration showing a present condition of mind,¹ while the latter was excluded.² The admission of such declarations of present intention seems to have been in part influenced by a specious analogy. On an issue of testamentary capacity, declarations of a testator evincing an insane state of mind are clearly admissible.³ The fundamental reason for the rule was, however, lost sight of in applying it to statements of intention. Imbecilic talk is circumstantial evidence of insanity;⁴ but a declaration of intention, though a declaration of a state of mind, is as little circumstantial evidence of the existence of the intention, as is a declaration of an objective fact circumstantial evidence of the existence of the fact declared. On this reasoning some courts have, since the famous case of *Sugden v. Lord St. Leonards*,⁵ put ante-testamentary and post-testamentary declarations on the same footing. The best considered opinions of American courts, whether excluding⁶ or admitting⁷ the latter, discuss the problem on principles applicable alike to both classes of declarations. The artificiality of attempting to distinguish between declarations of a state of mind and declarations of a fact is well illustrated by a Wisconsin case,⁸ where a declaration by a testatrix that she had destroyed a will by burning was held inadmissible as evidence of the fact so declared, but admissible, nevertheless, to show "that she died in the belief that she had left no will,"—reasoning that seems to involve the assumption that the testatrix may have been lying as to the fact, and yet telling the truth as to her belief in the fact.

On an issue of revocation, however, another question may be raised, an example of which is furnished by a recent Montana case, in which, to rebut a presumption of revocation, declarations by the testator that he was satisfied with the will were sought to be introduced, and were held inadmissible. *In re Colbert's Estate*, 78 Pac. Rep. 971. A present intention to do an act is evidence not only that the act was done, but also of the intention with which it was done, and in a well-known class of cases hearsay declarations of intention are admissible for the latter purpose. Thus, it is well settled that, when a change of domicile is in issue, the party's intention at the time of the moving may be shown by his declarations of an intention to move, as well when made before the time of the moving⁹ as when accompanying the act.¹⁰ The analogy of these cases would, therefore, point toward admitting the declarations in the principal case as evidence that the testator never had a revoking mind. These propositions obviously take for granted the admissibility of declarations of present intention, and are concerned only with the question of relevancy or remoteness. The credibility of a declaration of an intention, however, cannot depend on the inference to be drawn from the intention; and the question of hearsay bears only on the credibility of the declaration, not on the inference to be drawn from the fact declared. If, therefore, the test of credibility is to prevail, it is clear that a testator's declarations of intention are as objectionable to hearsay as

¹ *Doe d. Shallcross v. Palmer*, 16 Q. B. 747.

² *Quick v. Quick*, 3 Sw. & Tr. 442.

³ *Waterman v. Whitney*, 11 N. Y. 157.

⁴ See 3 Wigmore, Evidence § 1768.

⁵ 1 P. D. 154. Cockburn, C. J., admitted that he could not distinguish on principle between the two sorts of declarations.

⁶ See *Throckmorton v. Holt*, 180 U. S. 552.

⁷ See *Lane v. Hill*, 68 N. H. 275.

⁸ *In re Valentine's Will*, 93 Wis. 45.

⁹ *Viles v. Waltham*, 157 Mass. 542.

¹⁰ See *Matzenbaugh v. The People*, 194 Ill. 108.

his declarations of facts. As a matter of policy, however, since a person's declarations are often the only possible method of determining intention, it may well be that the test of credibility should give way to that of practical convenience.

RES JUDICATA AS APPLIED TO MATTERS OF LAW.—It is commonly said that any right, question, or fact, distinctly put in issue and directly determined by a court of competent jurisdiction, cannot be disputed in a subsequent action between the same parties, whether upon the same or upon a different subject-matter.¹ So sweeping a definition of *res judicata* has in many cases led to a failure to distinguish between its two main applications. It applies primarily in cases where parties seek to litigate again the same cause of action which has been decided between them in a prior suit, but it is employed also to estop them from disputing in one action matters that have been authoritatively settled between them in another.² In the first class of cases the wisdom of the rule is clear. The parties have had their day in court, the matter is settled, and the most obvious public policy forbids them to raise the controversy afresh.³ Consequently, the estoppel may fairly cover all matters connected with the former action. In the other class of cases, however, the rule should have a much narrower application. Not only should the estoppel be limited to matters distinctly put in issue and determined in the prior action,⁴ but it should also be restricted to questions of fact or mixed questions of law and fact, and should never be extended to pure questions of law.⁵ It is absurd to say that in so far as certain parties are concerned a court should be bound irrevocably to adhere to a proposition of law laid down in a previous suit. Yet this seems to be the result of many decisions.⁶ Of course, as a matter of practice, the courts would usually follow a former decision upon the same state of facts, and so it would in most cases make little difference to the parties whether their rights were determined as *res judicata* or upon the theory of *stare decisis*. That this is not always true is shown by a recent Nebraska case. A statute provided that railroads should not be subject to county taxes on any part of their continuous line of road. The plaintiff, a railroad, owned a bridge which had for some time been taxed by the defendant county. In 1886 the railroad had brought an action to recover back these taxes. All facts concerning the bridge being conceded, the court had found that it was not a part of the continuous line of road within the meaning of the statute.⁷ In subsequent suits between different parties this construction had been held to be erroneous. The present action was brought upon the same conceded facts to restrain the county from assessing the bridge for the year 1901. The court allowed the plaintiff to question the construction given the statute in the former action, holding that a question of law could not be *res judicata*. *Chicago, B., & Q. R. Co. v. Cass County*, 101 N. W. Rep. 11. The facts of this case furnish the strongest argument against the rule which applies the

¹ *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1.

² 2 Black, Judgments § 504.

³ 2 *Ibid* § 500.

⁴ *Cromwell v. County of Sac*, 94 U. S. 351.

⁵ Bigelow, Estoppel 100; *Philadelphia v. Ridge Ave. R. R. Co.*, 142 Pa. St. 484.

⁶ *Southern, etc., Co. v. St. Pauls, etc., R. Co.*, 5 C. C. A. 249.

⁷ *Cass County v. Chicago, etc., R. Co.*, 25 Neb. 348.

doctrine of *res judicata* to questions of law, for had the court adopted such a rule, it would have been forced to apply one construction of the law to the parties before it, while it applied a different construction in all suits between other persons.⁸

RECENT CASES.

ADVERSE POSSESSION — WHO MAY GAIN TITLE BY ADVERSE POSSESSION — RIGHTS OF ONE INTENDING TO ACQUIRE A HOMESTEAD. — The defendant entered the plaintiff's land, thinking that it belonged to the United States, with the intention of acquiring a homestead. He remained in possession until the statute of limitations had run, when the plaintiff attempted to eject him. *Held*, that the plaintiff is barred. *Maas v. Burdetzke*, 101 N. W. Rep. 182 (Minn.). See NOTES, p. 380.

ALIENS — EXCLUSION OF ALIENS AS A JUDICIAL QUESTION. — The Chinese Exclusion Act of 1894 provided that the decision of the appropriate immigration or customs officers excluding an alien should be final unless reversed on appeal to the Secretary of the Treasury. The Secretary of Commerce and Labor, to whom the enforcement of the law was subsequently delegated, refused admission to the adopted children of a Chinese merchant domiciled in this country and, as such, possessed of rights under a treaty with China. *Held*, that the decision is reviewable by the federal courts. *In the Matter of Fong Yim*, 32 N. Y. L. J. 1349 (U. S. Dist. Ct., S. D., N. Y., 1905).

The precise question seems never to have been adjudicated, but the result is hard to reconcile with certain decisions of the Supreme Court. See *Lem Moon Sing v. United States*, 158 U. S. 538. For some consideration of the principles involved, see 17 HARV. L. REV. 488.

BANKRUPTCY — INVOLUNTARY PROCEEDINGS — PETITIONER ESTOPPED BY PARTICIPATION IN APPOINTMENT OF RECEIVER. — After a receiver had been appointed for the defendant corporation, two of the present petitioners requested the court to appoint a co-receiver, and several months later used these receivership proceedings as a basis for petitioning the defendant into bankruptcy. *Held*, that the petitioners are estopped from instituting such proceedings. *Lowenstein v. Henry McShane Mfg. Co.*, 12 Am. B. Rep. 601 (U. S. Dist. Ct., Dist. of Md.).

As there is no precedent exactly in point, the court reasons from the rather doubtful analogy that one who assents to an assignment for the benefit of creditors is estopped from later setting it up as an act of bankruptcy. *In re Romanow*, 92 Fed. Rep. 510; *Simonson v. Sinscheimer*, 95 Fed. Rep. 948. The reasoning of these cases proceeds upon the ground that the creditor, having already agreed to one method of distribution of his debtor's property, cannot afterwards file a petition which would be virtually repudiating his former position. But the duty of a receiver is not necessarily like that of an assignee, to wind up and distribute the debtor's estate; it is primarily to preserve the property, and to carry on the business under the direction of the court. Since the receiver may not conduct the enterprise as satisfactorily as anticipated, it necessarily follows that a concurrence in his appointment is perfectly consistent with a later desire to have bankruptcy proceedings instituted. It would seem, therefore, that the petitioner could hardly be disqualified by such concurrence.

BANKRUPTCY — PRIORITY OF CLAIMS — RIGHT OF PARTNERSHIP CREDITORS TO SHARE IN INDIVIDUAL ESTATE. — A partnership of which a bankrupt had been a member was insolvent and had no solvent members surviving. *Held*, that creditors of the partnership may not participate in the bankrupt's estate until the bankrupt's personal creditors have been satisfied. *In re Corcoran*, 14 Oh. Fed. D. 294. See 17 HARV. L. REV. 132.

BILLS AND NOTES — CHECKS — EFFECT OF DEATH OF DRAWER. — The deceased on his death-bed drew a check in favor of the defendant and delivered it to him. The check was not presented to the bank until after the death of the drawer. The state claimed the funds by escheat. *Held*, that the defendant is entitled to them. *Phinney v. State ex rel. Stralton*, 78 Pac. Rep. 927 (Wash.).

For a discussion of the principles involved, see 17 HARV. L. REV. 104.

⁸ See *Boyd v. Alabama*, 94 U. S. 645; *Bernard v. Hoboken*, 27 N. J. Law 412.

CARRIERS—CONNECTING LINES—PRESUMPTION AS TO LOST GOODS.—In an action for lost goods against the latter of two connecting carriers, the plaintiff proved delivery of the goods to the first carrier and non-delivery by the second, but gave no proof of delivery by the first to the second. *Held*, that a presumption arises that the latter carrier received the goods. *St. Louis, etc., Ry. Co. v. Birdwell*, 82 S. W. Rep. 835 (Ark.).

In the absence of special agreement, England, Canada, and some of the United States hold the first carrier for loss occurring anywhere before final delivery. *Muschamp v. Lancaster, etc., Ry. Co.*, 8 M. & W. 421; *Grand, etc., Ry. Co. v. McMillan*, 16 Can. Supreme Ct. 543. These jurisdictions allow no recovery from the subsequent carriers, on the theory that they are agents of the initial carrier, with which alone the shipper contracts. Most American courts, however, declare that recovery may be had directly from the carrier which loses or damages the goods; and when the last carrier is sued, raise a presumption that the default occurred on its line. *Smith v. New York, etc., R. R. Co.*, 43 Barb. (N. Y.) 225; *Laughlin v. Chicago, etc., Ry. Co.*, 28 Wis. 204. If the American rule is to be held at all, some such presumption is necessary for the protection of the public. It is no hardship on the carriers, for, if they deem it expedient, they can exact from one another receipts fixing the responsibility where it belongs. But though necessary under the American rule, the presumption seems illogical, has no basis in fact, and apparently arises as well against the first or intermediate carrier as the last. *Brintnall v. Saratoga, etc., R. R. Co.*, 32 Vt. 665.

CARRIERS—WHO ARE PASSENGERS—RES IPSA LOQUITUR.—The plaintiff, employed as an express messenger by a company which had contracted with the defendant railway company for the carriage of express matter and the free transportation of its employees, while in the course of his employment was injured by a derailment of the defendant's train. In the absence of any explanation of the accident, the court refused to instruct that the fact of derailment was no evidence of the defendant's negligence. *Held*, that the instruction should have been given, since the express messenger is in the position of an employee of the defendant, and the doctrine of *res ipsa loquitur* is not applicable to injuries of servants. *Chicago, etc., Ry. Co. v. O'Brien*, 132 Fed. Rep. 593 (C. C. A., Eighth Circ.).

Most authorities reject the first premise of this case, and regard an express messenger as enjoying a position not less favorable than that of a passenger. *Yeomans v. Contra Costa, etc., Co.*, 44 Cal. 71; *Fordyce v. Jackson*, 56 Ark. 594. Nor does it necessarily follow from the contrary cases that an expressman is protected less than a passenger, except that he may contract to assume the risk of the railway's negligence. *Cf. Baltimore, etc., Ry. Co. v. Voigt*, 176 U. S. 498. The second premise has also been somewhat criticised. *McCray v. Galveston, etc., Ry. Co.*, 89 Tex. 168. But such formal argument seems unfortunate. The doctrine of *res ipsa loquitur* rests upon common sense, and the propriety of presuming the defendant's negligence should depend on the facts of the particular case. Whether its basis be mere expediency, probability, or the defendant's peculiar knowledge of the facts, the present case seems to warrant its application. The rule has apparently made headway against the presumption favoring employers, except where the servant is concerned in the control of the appliances from which accident results. *Cf. Houston v. Brush*, 66 Vt. 331, 342. As an express messenger is not within that exception, the decision would appear to be unhappy both upon its reasoning and in its conclusion.

CHATTEL MORTGAGES—NOTICE UNDER THE RECORDING ACTS.—A commission merchant sold mortgaged cattle and remitted the proceeds of the sale to the consignor, without actual knowledge of the existence of the mortgage, which was recorded. The mortgagee sought to recover the amount of the net proceeds from the commission merchant in an action for money had and received. *Held*, that the action does not lie. *Greer v. Newland*, 78 Pac. Rep. 835 (Kan.).

This reverses, on rehearing, the former decision by the same court, which was adversely criticised in 18 HARV. L. REV. 54.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—RIGHTS AGAINST ACTION BY INDIVIDUALS.—The defendants took a prisoner from the custody of state officers and lynched him. They were indicted under a federal statute providing for the punishment of persons who should conspire to prevent or hinder the free exercise or enjoyment by any citizen of any right or privilege secured to him by the Constitution or laws of the United States. *Held*, that the defendants may be convicted of a conspiracy to deprive the prisoner of his right under the Fourteenth Amendment to have the state afford him due process of law. *Ex parte Riggins*, Circuit Court of the United States, N. D., Ala. N. D.

The Fourteenth Amendment operates as a guaranty only that the state shall not deprive any citizen of the United States of due process of law; and in the absence of state action, or such inaction as to amount to deprivation, it is difficult to see how any right of the citizen under the amendment can be infringed. The reasoning of the court, though ingenious, leads in effect to the conclusion that the amendment safeguards the citizen against the acts of individuals, a theory which has been expressly repudiated. *Civil Rights Cases*, 109 U. S. 3. If the decision be sound, persons conspiring to prevent a negro from voting at state elections could be punished for a conspiracy to deprive him of the right not to have state officials discriminate against him in excluding him from voting. It has been held, however, that the Fifteenth Amendment gives no authority to punish such persons. *Korem v. United States*, 121 Fed. Rep. 250. The leading case upon which the court relies rests only upon the power of Congress to regulate federal elections. *Ex parte Yarborough*, 110 U. S. 651; cf. *Lackey v. United States*, 107 Fed. Rep. 114. If the decision be upheld, the generally accepted view that the constitutional amendments leave exclusively to the states the final protection of their citizens must be substantially modified; and the limits of federal power of interference will be difficult to define. See *United States v. Harris*, 106 U. S. 629.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — LIMITATION OF HOURS OF LABOR. — A city ordinance provided that eight hours should constitute a day's work on any work done for the city, and that any contractor who violated this provision should be guilty of a misdemeanor. *Held*, that the ordinance is constitutional. *Broad v. Woydt*, 78 Pac. Rep. 1004 (Wash.).

For a discussion of the question, see 17 HARV. L. REV. 50, 419.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — LIBEL OF A JUDGE AFTER SATISFACTION OF JUDGMENT. — *Held*, that a libelous article concerning a judge, published by a litigant after judgment in his cause has been rendered and satisfied, is contempt of court. *Burdett v. Commonwealth*, 48 S. E. Rep. 878 (Va.).

Of "constructive" contempts by publication, committed outside the presence of the court, the principal classes are those which obstruct pending proceedings, and those which discredit the court. Although, in cases of the first group, the courts *obiter* vigorously maintain their right to deal with the latter sort of offenses, it is believed that this is the first American decision to support the position squarely; and English cases are rare. See *Regina v. Gray*, [1900] 2 Q. B. 36; cf. *Dandridge's Case*, 2 Va. Cas. 408. Unquestionably, the common law, to preserve the independence and authority of the higher courts, invests them with an absolute power summarily to punish contempt. But how far shall that power limit the popular right to free speech? Even in England committals for scandalizing the court were recently said to be obsolete. See *McLeod v. St. Aubyn*, [1899] App. Cas. 549, 561. The better American decisions, recognizing our constitutional guaranties, limit constructive contempts to such publications as interfere with the progress of litigation already pending. *State ex rel. The Attorney-General v. Circuit Court for Eau Claire County*, 97 Wis. 1; *Neel v. State*, 9 Ark. 259. As practically all adjudged cases of constructive contempt, other than those by officers of the court, fall within this class, such a distinction would seem to be safe.

CONTRACTS — DEFENSES — IMPOSSIBILITY BY OPERATION OF LAW. — During the war between China and Japan the defendant carrier contracted to transport copper from New York to Yokohama. After an ineffectual attempt to withdraw from the contract on the ground that the goods at Tacoma were contraband, the carrier undertook the transportation. The government official, however, refused to clear the vessel carrying the copper on the ground that as contraband it could not legally be exported to Japan. The vessel consequently sailed without it. The following day it appeared that there was no legal objection to the exportation of the copper. *Held*, that the mistake of the official is no defense under the circumstances. *Northern Pacific Railway Co. v. American Trading Co.*, 25 Sup. Ct. Rep. 84. See NOTES, p. 384.

CONTRACTS — DEFENSES — IMPOSSIBILITY CAUSED BY VOLUNTARY DISSOLUTION OF PARTNERSHIP. — The defendants, who carried on business in partnership, agreed to become buying agents for the plaintiffs for a term of five years and to pay for a minimum quantity of the plaintiffs' products each year. The expressed intention was that a certain district should be represented by the defendants for that period. During the term the defendants dissolved partnership and the plaintiffs sued for breaches of the agreement committed after the dissolution. *Held*, that there was no implied term in the contract that the defendants would not disable themselves from carrying out the agreement by dissolving partnership, and therefore they are not liable. *Bovine (Limited) v. Dent and Wilkinson*, 21 T. L. R. 82 (Eng., K. B. D.).

In both England and the United States a corporation that voluntarily winds up business is liable on its contracts. *In re English Joint Stock Bank*, L. R. 4 Eq. 350; *Lovell v. St. Louis Insurance Co.*, 111 U. S. 264. And it is a general principle that if parties make an agreement to which effect can be given only by the continuance of an existing state of things, each impliedly engages to do nothing that will end that state. *Stirling v. Maitland*, 5 B. & S. 840. So firmly is this established that, although impossibility caused by law is a well-recognized excuse, it will not avail where the defendant secured the passage of the disabling law. *Re Companies' Act*, 117 L. T. 60; see 18 HARV. L. REV. 64. A partnership has recently been held not discharged from its executory contracts by a sale of its business. *Ogdens (Limited) v. Nelson*, [1904] 2 K. B. 410. The court seeks to distinguish the principal case by the fact that the consideration had not been given. But other cases do not require that. *Brace v. Calder*, [1895] 2 Q. B. 253. At most the distinction can be important only as bearing on the probability of an implied agreement; and in this case the contract seems too clear for it to have any decisive effect.

EQUITABLE ELECTION — BEQUEST BY DONEE OF POWER TO ONE ENTITLED IN DEFAULT OF APPOINTMENT — REMOTE APPOINTMENT. — A testator under a power made appointments that were too remote, and by the same will gave some of his own property to those entitled in default of appointment. *Held*, that no case of election is raised. *In re Oliver's Settlement*, 21 T. L. R. 61 (Eng., Ch. D.).

Where a testator appoints to persons not objects of a power and leaves his own property to one who would take in default of appointment, the latter is put to his election. *Whistler v. Webster*, 2 Ves. Jun. 367. But where the appointment fails because too remote, election has been considered unnecessary. See *Wollaston v. King*, L. R. 8 Eq. 165. This dictum applied a supposed exception that election requires one claim *dehors* the will. This is doubtful 1, and inapplicable to the facts of later cases. GRAY, PERPETUITIES §§ 541-559; *In re Warren's Trusts*, 26 Ch. D. 208. That case refuses election, since the remote appointment is considered *ex facie* void and therefore not to be read as part of the will. But remoteness like the objects of the power can be determined only by examining the instrument creating the power. The principal case rests squarely on the ground that as the rule against perpetuities is based on public policy it should not be circumvented. But no policy forbids one who takes at law on default to limit the property as the testator desires if he wishes to receive his legacy, provided he himself respects the rule against perpetuities. Yet that would be just the effect of election here, as in the normal case of bequeathing a legatee's property. See GRAY, PERPETUITIES § 551. The weight of authority, however, is with the principal case. *Re Beales' Settlement*, 118 L. T. 154; *contra*, *In re Bradshaw*, [1902] 1 Ch. 436; see *Graham v. Whittidge*, 57 Atl. Rep. 609, 615 (Md.).

EVIDENCE — DECLARATIONS CONCERNING INTENTION — POST-TESTAMENTARY DECLARATIONS OF TESTATOR ON ISSUE OF REVOCATION. — *Held*, that declarations by a testator to the effect that he was satisfied with a will are inadmissible to rebut the presumption of revocation raised by failure to produce the will. *In re Colbert's Estate*, 78 Pac. Rep. 971 (Mont.). See NOTES, p. 387.

EVIDENCE — DECLARATIONS CONCERNING INTENTION — STATEMENTS IMPLYING INTENTION TO COMMIT SUICIDE AS PROOF OF SUBSEQUENT ACT. — In an action on a life insurance policy, the defendant, in order to prove that the insured had committed suicide, sought to introduce in evidence the following declaration of the deceased made about an hour before his death: "Adolph, will you be as good a friend to my wife as you have been to me?" *Held*, that the declaration is not admissible. *Ross-Lewin v. Germania, etc., Co.*, 78 Pac. Rep. 305 (Col.).

In most jurisdictions declarations of intention are admitted in proof of a subsequent act; where the declarations are made under circumstances precluding the idea of misrepresentation or bad faith, and so close to the act in point of time as to render it probable that the intention was carried into execution. *Commonwealth v. Trefethen*, 157 Mass. 180; *Rens v. Northwestern, etc., Ass'n*, 100 Wis. 266. In the present case the court, while not squarely rejecting this doctrine, refuses to apply it to a case where the statement does not expressly declare the alleged intention, but merely implies it. The soundness of this decision seems doubtful; for, once admitting that the intention is a relevant fact and that it may be proved by evidence of declarations, it is difficult to see why a statement should not be admitted, which under the circumstances could reasonably be interpreted as expressing such intention. In cases of murder and arson remote and obscure allusions to the act in contemplation are often admitted to show an existing disposition or design. *State v. Hoyt*, 47 Conn. 518; *State v. Gailor*, 71 N. C. 88.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — COURT'S DISCRETION TO EXCLUDE PURELY CUMULATIVE EVIDENCE. — *Held*, that in a jury trial evidence should not be excluded on the ground that testimony already introduced, if believed, amounts to proof. *Perkins v. Rice*, 72 N. E. Rep. 323 (Mass.). See NOTES, p. 381.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION BOND — SURETY'S LIABILITY FOR DEBT OF INSOLVENT ADMINISTRATOR. — *Held*, that the sureties on an administrator's bond are not liable for a debt which the administrator owed the estate, when he was at all times insolvent. *Buckel v. Smith's Administrator*, 82 S. W. Rep. 1001 (Ky.).

There is no statute in Kentucky affecting debts due the estate by the administrator. At common law the appointment of the intestate's debtor as administrator suspended action on the debt. *Ferebee v. Doxey*, 6 Ired. (N. C.) 448. But later the equitable presumption that what the law requires to be done has been done, was invoked, even in actions at law, to make his own debt assets in the hands of the administrator. *Crow v. Conant*, 90 Mich. 247. This fiction of payment has been applied to charge the surety on the administration bond with the full amount of the debt even though the debtor was insolvent when he became administrator. *Leland v. Felton*, 1 Allen (Mass.) 531. Since this presumption is an equitable one, however, it should be limited by considerations of fairness. The surety of the administrator did guarantee an honest administration, but he never contemplated becoming in effect a surety for past obligations; and to permit the estate to profit at his expense by the interposition of a legal fiction seems manifestly unjust. See *McCarty v. Frazier*, 62 Mo. 263.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST — RIGHT TO APPEAL FROM DECISION IN FAVOR OF LEGATEE. — By an express stipulation in a will, any beneficiary contesting it was to forfeit his interest thereby. The executrix claimed that the petitioners had lost their rights under the will by a violation of this provision, and brought this appeal from an adverse order of the probate court. *Held*, that the appellant, as executrix, not being a party aggrieved, cannot have this question decided on appeal. *In re Murphy's Estate*, 78 Pac. Rep. 960 (Cal.).

Whenever obedience to the order of the probate court would subject the executor to liability it is clear that he is an interested party having the right of appeal. *In re Welch*, 106 Cal. 427; *Cheever v. Washtenaw Circuit Judge*, 45 Mich. 6. But where no personal liability exists, it is questionable whether the executor alone may appeal from an order of apportionment among the beneficiaries. One group of decisions holds that the executor is a party in interest, and that it is his right and duty to appeal from an order believed to be erroneous. *Ruch, Administrator v. Biery*, 110 Ind. 444. A majority of the decisions, however, support the principal case. *Bryant v. Thompson*, 128 N. Y. 426; *Merrick v. Kennedy*, 46 Neb. 264. The executor certainly has an interest in securing a judicial determination of questions involving distribution of property; but such interest should not necessarily extend to the enforcement of his own preconceived views, especially if the expenses of litigation rest upon the estate. Otherwise the funds intended for one beneficiary would be used in fighting the battles of another. It would seem, therefore, that in a controversy between the legatees, the right of appeal should be left with them alone.

FIXTURES — WHETHER ELECTRIC CARS ARE FIXTURES. — Under a statute authorizing the taxation of real estate, the plaintiff's electric cars were assessed. *Held*, that the assessment is illegal. *Toronto Ry. Co. v. City of Toronto*, [1904] A. C. 809.

In the case of steam railroads the better view, and the one supported by the weight of authority, is that the rolling stock is personalty. *Williamson v. New Jersey, etc., R. R. Co.*, 29 N. J. Eq. 311; *Hoyle v. Plattsburg, etc., R. R. Co.*, 54 N. Y. 314. This conclusion seems inevitable in view of the fact that the cars of one company are constantly being hauled over the lines of others. It would appear that the decision in the case of electric railways should be the same. An effort has been made, however, to draw a distinction upon the ground that, owing to the mode of operation by means of a continuous current of electricity passing from the wires through the cars and rails back to the generator, the cars are but parts of one great machine, which is affixed to the realty by means of its rails and power house. *Bank of Montreal v. Kirkpatrick*, 2 Ont. L. Rep. 113. This reasoning seems fanciful, and utterly fails to cover the case where the cars of a suburban line pass from their own tracks along those of a city company. The present decision, holding that electric cars are personalty, overrules the case last cited.

GIFTS — GIFTS MORTIS CAUSA — DONEE ALREADY IN POSSESSION. — The plaintiff's father, shortly before his death, told the plaintiff that he gave him a team of horses;

which the plaintiff already had in his possession and care, and the latter replied that he accepted the gift. His previous possession remained unchanged till the donor's death. *Held*, that it may be left to the jury to find a valid gift *mortis causa*. *Davis v. Kuck*, 101 N. W. Rep. 165 (Minn.).

Although the subject of the gift is already in the possession of the donee, the English and American courts agree in holding no formal act of delivery necessary to a valid gift *inter vivos*; the act of the donor in receiving back and redelivering to the donee the subject of the gift is excused as useless ceremony. *Winter v. Winter*, 4 L. T. R. 639; *Porter v. Gardner*, 60 Hun (N. Y.) 571. The present decision, following an English case, applies the same rule to gifts *mortis causa*. *Cf. Cain v. Moon*, [1896] 2 Q. B. 283. An American court had previously held that, without a new delivery resulting in an actual change of possession, a gift *mortis causa* is invalid. *Drew v. Hagerly*, 81 Me. 231. By the former rule what is virtually, though not technically, a testamentary disposition is made possible by the mere permission to the donee verbally given and accepted, to continue an existing possession with the added right of ownership. In view of the danger of fraud in gifts *mortis causa*, a formal act of delivery should be necessary to supply a substitute for the formalities of a duly executed will.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — EFFECT OF MARRIED WOMEN'S PROPERTY ACTS ON ESTATE BY ENTIRETY. — Under a statute whereby a married woman could hold and dispose of property as if she were unmarried, the defendant, a married woman, undertook to harvest a crop on land of which she and the plaintiff, her husband, were tenants by the entirety. *Held*, that she will be enjoined from such action. *Morrill v. Morrill*, 101 N. W. Rep. 209 (Mich.).

At common law an estate by the entirety differed from a simple joint tenancy in which the husband's right of control was an incident of the marriage relation. A joint tenancy did not become an estate by the entirety upon the marriage of the joint tenants, and could be conveyed to a husband and wife without giving the rights incident to an estate by the entirety. *CO. LIT.* 187 b.; *Thornburg v. Wiggins*, 135 Ind. 178; see *In re March*, 27 Ch. D. 166, 170. In the latter estate the wife had an indestructible right of survivorship, but none to the profits during coverture. *Pray v. Stebbins*, 141 Mass. 219. The principal case, therefore, seems sound. Although the statute gives a wife a new right to the profits of property acquired by her before and during coverture, this is not conclusive. It gives her, to be sure, full control over what was already her own, but the essential nature of an estate by the entirety is that the wife has no present interest during coverture, and the statute does not purport to change the nature of estates. *Contra, Hiles v. Fisher*, 144 N. Y. 306.

INJUNCTIONS — ACTS RESTRAINED — ENFORCEMENT OF JUDGMENT BY DEFAULT ENTERED ON FALSE RETURN OF SERVICE. — The plaintiff brought a bill in equity to set aside a judgment at law entered against him by default, on the ground that the sheriff's return of service was false. *Held*, that except where the plaintiff at law was a party to the false return or knowingly took advantage of it, the bill will not lie. *Smoot v. Judd*, 83 S. W. Rep. 481 (Mo., Sup. Ct.).

The authorities on this point are equally divided. The plaintiff's only remedy at law is an action against the sheriff for a false return. *Heath v. Missouri, etc., Railway Co.*, 83 Mo. 617. The courts refusing equitable relief argue that judgments must be kept stable, so that all persons may safely act upon them as final. Yet, though the same argument applies, these courts will relieve against a judgment obtained by fraud, or one given by a court having no jurisdiction. *Wingate v. Haywood*, 40 N. H. 437; *United States, etc., Co. v. Reisinger*, 43 Mo. App. 571. The defendant's innocence can scarcely be a substitute for the lack of service upon the plaintiff, or act as a payment of value for the judgment whereby he is prejudiced if it be set aside. Clearly the plaintiff ought not to have to answer to this judgment, for the court giving it in reality had no jurisdiction, though it may assume to have had by making the sheriff's return conclusive. *Ridgeway v. Bank of Tennessee*, 11 Humph. (Tenn.) 523. The plaintiff has never been heard. Furthermore his remedy at law is inadequate, especially if the judgment in any way affects his land. It would seem, therefore, that the plaintiff should be entitled to equitable relief. *Miller v. Gorman*, 38 Pa. St. 309.

INSURANCE — EMPLOYERS' LIABILITY INSURANCE — RIGHT OF EMPLOYEE AGAINST INSURER BEFORE SATISFACTION OF JUDGMENT. — An employee, injured by accident, got a judgment against his employer and brought a bill against the company which had insured the latter against loss from such accidents. *Held*, that as the contract was between the insurance company and the employer, no liability arose until the latter suffered actual loss by paying the judgment, and there was no debt for the plaintiff to impound. *Finley v. United States Casualty Co.*, 83 S. W. Rep. 2 (Tenn.).

See 18 HARV. L. REV. 154, for a review of an article discussing the principles here involved.

INSURANCE—INSURABLE INTEREST—REASSIGNMENT OF POLICY TO PERSON WITHOUT SUCH INTEREST.—The defendant was the remote assignee of an insurance policy which had originally been assigned by the insured. Neither the defendant nor the intermediate assignees had any insurable interest in the life of the insured. *Held*, that the defendant is entitled to the proceeds of the policy. *Gordon v. Ware National Bank*, 132 Fed. Rep. 444 (C. C. A., Eighth Circ.).

The weight of authority supports the rule that a life-insurance policy may be assigned by the insured to an assignee who has no interest in his life. *Clark v. Allen*, 11 R. I. 439; *contra*, *Missouri, etc., Co. v. Sturges*, 18 Kan. 93. But the question whether the assignee may reassign without the consent of the insured has rarely come before the courts and seems to be still open. *Cf. Steinbach v. Diepenbrock*, 158 N. Y. 24; *contra*, *Thornburg v. Aetna, etc., Co.*, 30 Ind. App. 682. The argument urged against reassignment is that it endangers the life of the insured, by not permitting him to select a reputable assignee. Modern business conditions have, however, greatly reduced the force of this argument, which has been considered of little weight by numerous courts. See *Chamberlain v. Butler*, 61 Neb. 730, 738. Nor does the objection that it is void as a wagering contract apply in this case more than in that of the first assignment, for the element of wager is not increased by the fact that the insured did not assent. Furthermore, the decision in the principal case is to be desired, as it is in accordance with the tendency to render property freely transferable.

INSURANCE—MARINE INSURANCE—RIGHT OF INSURER TO SUMS RECOVERED BY INSURED.—The insured, under a valued policy, collected the insurance from the insurer after abandonment, and later recovered a larger amount from the one causing the loss. *Held*, that the insurer's right in the sum so recovered is limited to the amount which he paid to the insured. *The Livingstone*, 130 Fed. Rep. 746 (C. C. A., Second Circ.). See NOTES, p. 383.

LANDLORD AND TENANT—ASSIGNMENT AND SUB-LETTING—RIGHT OF LESSEE HAVING REVERSIONARY LEASE TO DISTRAIN.—A lessor agreed to grant the defendant, his lessee, a new lease of seventy-three years to begin on the expiration of his present term. Subsequently, a few months before the expiration of the original term, the lessee leased the premises to the plaintiff for twenty-one years. He distrained for rent in arrear before the expiration of his original term. *Held*, that the defendant has no right to distrain, as he has no reversionary interest. *Lewis v. Baker*, 21 T. L. R. 17 (Eng., Ch. D.).

If a lessee makes a lease for a term greater than his own, no estoppel arises between him and his tenant, because, though a tenant is estopped to deny his landlord's title when the landlord has no interest, yet when he has some interest and purports to pass a greater, the tenant can confess and avoid. *Langford v. Selmes*, 3 Kay & J. 220. In England such a lease operates as an assignment and leaves the assignor no reversionary interest, which is necessary to give a right to distrain. *Preece v. Corrie*, 5 Bing. 24. Consequently, in the principal case the defendant's lease to the plaintiff operated as an assignment, and unless he acquired a reversionary interest through the agreement of the lessor to grant him the subsequent lease, he lost his right to distrain. But a mere agreement to grant a lease gives no legal interest whatever. *Phillips v. Hartley*, 3 C. & P. 121. Even had the lease been granted, the defendant would have had only an *interesse termini*, which gives no reversionary interest to support the right to distrain. *Doe v. Walker*, 5 B. & C. 111; *Smith v. Day*, 2 M. & W. 684. The principal case, therefore, seems sound.

LIMITATION OF ACTIONS—OPERATION AND EFFECT—RAILWAY TICKETS.—The plaintiff offered for his passage over the defendant railway a ticket purchased fourteen years previously, which was refused. Because the plaintiff would not pay any other fare he was ejected from the train, for which he brought suit. *Held*, that there can be no recovery. *Cassiano v. Galveston, etc., Ry. Co.*, 82 S. W. Rep. 806 (Tex., Civ. App.).

The court argues that the statute of limitations had run against the ticket, which was therefore void. Ordinarily the statute begins to run only when a cause of action has accrued. For example, suit may generally be brought at once upon the delivery of a demand note; but where demand is a condition precedent to a cause of action, the statute begins to run only when the demand is made. *Ganley v. Troy, etc., Bank*, 98 N. Y. 487, 493; *Stanton v. Stanton's Estate*, 37 Vt. 411. Yet it has often been held that such demand, to found a cause of action, must be made within a reasonable time, generally the period of the statute of limitations. *Sheaf v. Dodge*, 161 Ind. 270; *Smith v. Smith's Estate*, 91 Mich. 7. This requirement would seem to be outside the direct operation of the statute, and to be rather based upon a condition implied in the con-

tract, the reasonable time being fixed by a convenient analogy to the limitation of actions. Such a principle is capable of wide and perhaps satisfactory results in cases such as this, where an immediate or early performance of a contract is usual and expected. The present case appears to involve a new application of the doctrine.

MANDAMUS — ACTS SUBJECT TO MANDAMUS — REFUSAL OF A COURT TO TRANSFER A CAUSE FROM THE LAW TO THE EQUITY DOCKET. — An inferior court denied the petitioner's motion to transfer a cause in which he was a party from the law to the equity docket. The petitioner prayed for a writ of *mandamus*. *Held*, that the act sought cannot be compelled by *mandamus*. *Horton v. Gill*, 82 S. W. Rep. 718 (Ind. T.).

It is well settled that a writ of *mandamus* may be issued to compel an inferior court as well as any other public officer to perform a purely ministerial duty. *Commonwealth ex rel. Hoopes v. Thomas*, 163 Pa. St. 446. It will not be issued, however, to compel a court to perform a judicial act in a particular way. *Chase v. Blackstone Canal Co.*, 10 Pick. (Mass.) 244. In view of the fact that before ruling upon a motion to transfer a cause from one docket to another a court must consider the facts or allegations upon which the motion is based, it would seem that the duty involved was rightly regarded as judicial rather than ministerial in the principal case. Moreover, it is well established that the existence of another remedy adequate to correct the action of an inferior court will prevent relief by *mandamus*. *Shelby v. Hoffman*, 7 Oh. St. 451. And it seems clear that an order upon a motion to transfer a cause from one docket to another may be reviewed by a higher court upon appeal or writ of error. *Wright v. Herlong*, 16 S. C. 620.

MASTER AND SERVANT — FELLOW-SERVANT AND VICE-PRINCIPAL DOCTRINES — MASTER'S LIABILITY IN MATTERS OF DETAIL. — A gang of carpenters was employed to erect temporary scaffolding on which the plaintiff, a riveter, was to work. The foreman used a defective plank, after promising the plaintiff to repair it. As a result the plaintiff was injured. *Held*, that the employer is not liable. *Hempstock v. Lackawanna, etc., Co.*, 90 N. Y. Supp. 663. See NOTES, p. 382.

NEGLIGENCE — DUTY OF CARE — LANDOWNER'S DUTY TO FIREMAN. — While in the defendant's building, engaged in extinguishing a fire, the plaintiff, a member of the city fire-department, was injured by the unsafe condition of the premises. *Held*, that he cannot recover. *Eckes v. Steiler*, 90 N. Y. Supp. 473.

All persons who enter land at the invitation of the owner on ordinary business, are entitled to be protected against the unsafe condition of the premises. *Indermaur v. Dames*, L. R. 1 C. P. 274. Four courts have held that a fireman who enters property to extinguish a fire is not entitled to such protection. *Cf. Beehler v. Daniels, etc., Co.*, 18 R. I. 563. These courts seem to consider that the predominant purpose of such an entry is to prevent the spread of the flames rather than to protect the property of the owner. Furthermore, since firemen are often authorized by statute to enter any building to extinguish a fire, courts are averse to implying an invitation to enter. It seems that the function of a fireman is twofold: to protect the owner's property and to prevent the spread of the flames. The courts might have emphasized the first element and have held that as his entry was beneficial to the owner he was an invited person. But the hardship of compelling landowners always to keep their property in a safe condition is a strong practical argument in favour of the present decision.

RAILROADS — LIABILITY TO TRESPASSER — TRESPASSER ON TRAIN INJURED BY COLLISION. — The plaintiff's intestate was a brakeman on one of the defendant's two freight trains which were halted temporarily, facing each other about fifty yards apart. After both crews had alighted, the deceased's train, because of a defective throttle, started, and collided with the other train, killing the deceased, who had boarded the locomotive of the latter for a purpose unconnected with his employment. *Held*, that a peremptory instruction may be given in favor of the defendant. *Shadoan's Administrator v. Cincinnati, etc., R. R. Co.*, 82 S. W. Rep. 567 (Ky.).

In the absence of proof that the rules of the company permitted the deceased to board another train, he was a trespasser. *McNimara v. Great Northern Ry. Co.*, 61 Minn. 296. Although by the better view employees of a train are under a duty to ascertain the presence of trespassers on their tracks, consistently with the performance of their paramount duty to protect property transported, courts very commonly deny that a similar duty is owed to adult trespassers on trains. *Grunst v. Chicago, etc., Ry. Co.*, 109 Mich. 342; *cf. Cincinnati, etc., R. R. Co. v. Smith*, 22 Oh. St. 227. A railroad does not owe to the latter class the duty of a carrier of passengers, but that of a landowner not to injure them by active negligence; and the hazardous nature of railroad business raises a duty of care to discover trespassers, the degree of which varies with

the probability of their presence. As a question of fact, however, the presence of trespassers is not so notorious on trains as on tracks, and the facts reported in the present case seem to show no neglect of the duty to anticipate the presence of the plaintiff's intestate. The same decision would apparently follow also from the fellow servant doctrine. *Greer v. Louisville, etc., R. R. Co.*, 94 Ky. 169.

RECEIVERS — PENDENCY OF NUMEROUS ACTIONS AGAINST CORPORATION AS GROUND FOR APPOINTMENT. — The plaintiffs' bill stated that over one hundred and eighty people were killed by the negligence of the defendant company; that one hundred and fifty suits for damages were pending against it; and that, since the plaintiffs' suit was not among the first, it was not probable that any assets would be left when their suit was decided. They therefore prayed for the appointment of a receiver to preserve the property until the rights of all the creditors should be determined. *Held*, that a receiver will not be appointed. *Slover v. Coal Creek Coal Co.*, 82 S. W. Rep. 1131 (Tenn.).

The power of equity to appoint a receiver has generally been exercised where the plaintiff has brought suit, and there is danger that the defendant will wrongfully dispose of his property before execution can be levied. *Vila v. Grand Island, etc., Co.*, 97 N. W. Rep. 613 (Neb.). The principal case, however, does not fall within this class. The plaintiffs did not ask for a receivership *pendente lite*, but sought to impound the property till all the actions should be determined. Nor does it fall within that class of cases where the purpose is to wind up a corporation, since such relief is not asked. Finally, it is not one of those exceptional instances in which the court interferes with the management of a corporation by appointing a receiver, when the assets are being wrongfully wasted. *Conro v. Gray*, 4 How. Pr. (N. Y.) 166. The bill therefore asked for no recognized form of relief, and the court seems justified in refusing to make an exception in this case. Although the result reduces the plaintiffs' chances of sharing in the assets, the defendant's liability in the tort actions is too conjectural to warrant virtually holding up its business pending their litigation.

RES JUDICATA — MATTERS CONCLUDED — MATTERS OF LAW. — A statute provided that railroads should not be subject to county taxes on any part of their continuous line of road. The plaintiff, a railroad, owned a bridge which had for some time been taxed by the defendant county. In 1886 the railroad had brought an action against the county to recover back these taxes. All facts concerning the bridge being conceded, the court had found that it was not a part of the continuous line within the meaning of the statute. In subsequent suits between different parties this construction had been held erroneous. The present action was brought upon the same conceded facts to restrain the county from assessing the bridge for the year 1901. *Held*, that the matter is not *res judicata*. *Chicago, B. & Q. R. R. v. Cass County*, 101 N. W. Rep. 11 (Neb.). See NOTES, p. 389.

RULE AGAINST PERPETUITIES — INTERESTS SUBJECT TO THE RULE — OPTIONS TO PURCHASE FEE. — A lease for ninety-nine years contained a covenant that the lessee might, at any time during the term, purchase the fee. *Held*, that the covenant is void as contravening the rule against perpetuities. *Woodall v. Clifton*, 39 Law Jour. 644 (Eng., Ch. D.). See NOTES, p. 379.

SALES — RIGHTS AND REMEDIES OF BUYERS — RIGHT OF INSPECTION IN SALES C. O. D. — *Semble*, that a valid tender of goods sent C. O. D. cannot be made without allowing inspection. *Thick v. Detroit, etc., Ry. Co.*, 101 N. W. Rep. 64 (Mich.). See NOTES, p. 386.

SET-OFF AND COUNTERCLAIM — CLAIM IN ASSUMPSIT ON WAIVER OF TORT. — To an action on a note the defendant pleaded a set-off of the money received by the plaintiff through the wrongful conversion and sale of property of the defendant's intestate. *Held*, that, although the defendant might have waived the tort and sued in assumpsit, the claim cannot be set off under a statute allowing set-off of claims "under contract" or "damages for breach of contract." *Heyman v. Thomas*, 32 Wash. Law Rep. 792 (D. C.).

Statutes of set-off in most jurisdictions are interpreted so as to allow such a set-off as was claimed here. The conflict in the decisions seems to come from a difference of interpretation rather than from any real distinction between the statutes, though their wording often varies. Indiana, with a statute allowing set-off of claims arising "out of debt, duty, or contract," agrees with the principal case. *Richey v. Bly*, 115 Ind. 232. Kansas, allowing set-off of a "cause of action arising upon contract," reaches a contrary result. *Challiss v. Wylie*, 35 Kan. 506. On a strict construction of the wording of the statute in the District of Columbia, the decision of the court may be justified,

but the result is undesirable and the rule of most jurisdictions seems better. Set-off statutes, being remedial in their nature, should be liberally construed, both in the interest of justice to defendants and to prevent multiplicity of suits. *Sargent v. Southgate*, 5 Pick. (Mass.) 312.

STATUTES — INTERPRETATION — WHO IS CHINESE LABORER UNDER EXCLUSION ACT. — The Chinese Exclusion Act of May 5, 1892, provided for the deportation of any Chinese laborer not having a certificate of residence as therein prescribed. The petitioner, who was arrested under the above act, was born in England of a Chinese father and an English mother, but had been residing in this country for twenty-four years. He petitioned for a writ of *habeas corpus*, on the ground that he was not a Chinese laborer within the meaning of the act. *Held*, that the term "Chinese laborer" means a person whose father and mother are both of the Chinese race. *United States v. Sam Yuen*, 37 Chi. Leg. N. 117 (U. S. Dist. Ct., S. D. N. Y.).

As the question here involved arises for the first time, it is necessary, in order to find analogies, to examine the decisions relating to negroes and Indians. The former class of cases is of little aid, being based mainly upon statutes providing that a person having one-fourth, or one-eighth, negro blood shall be deemed of that race. Other decisions regard the predominating blood as determining the race. *Lane v. Baker*, 12 Oh. 237. And again, in some jurisdictions, the distinction is made between negroes and colored persons of mixed blood. *Fraser v. The State*, 3 Tex. App. 263. Decisions relating to Indians furnish a better analogy, being free from statutory limitations. Here it is generally held that the race of the father determines that of the children. *Ex parte Reynolds*, 5 Dill. (U. S. C. C.) 394. But upon a strict definition it has been decided that a half-breed is neither white nor Indian. *In re Camille*, 6 Saw. (U. S. C. C.) 541. Since the principal case is one that would involve great hardship to the petitioner, the rule of strict interpretation should be applied. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29. If the immigration of Chinese half-breeds is undesirable, the remedy lies in Congressional enactment.

SURETYSHIP — SURETY'S DEFENSES: EXTINCTION OF PRINCIPAL OBLIGATION — SURETY'S RIGHT TO CONTROL APPLICATION OF PAYMENTS. — The defendant, indebted to the plaintiff, among other items, for materials used on a city contract, paid him certain sums received from the city, which the plaintiff applied to another account with notice of the source of the payment, and then joined the surety on the defendant's bond in a suit for the price of the materials. *Held*, that the surety is equitably entitled to have the payment applied in satisfaction of the debt on which he was liable. *Crane Co. v. Pacific, etc., Co.*, 78 Pac. Rep. 460 (Wash.).

Although in general when one owing several debts to a creditor, pays him money without directing its application in any particular manner, the latter may appropriate it to either of the debts, still in certain cases where the sum paid is a specific fund, the payment of which is secured by sureties, they are entitled to have the money used in discharging the secured claim. *Porter v. Stanley*, 47 Me. 515. The burden, however, is upon the surety to prove that payment is made from such specific fund. *Merchants' Insurance Co. v. Herber*, 68 Minn. 420. In the principal case, as the sum due the plaintiff was much less than the contract price owed by the district, it is difficult to say that any part of the larger sum is to be specifically paid in satisfaction of the secured claim, and is not applicable to other indebtedness. If the defendant has full control over the money and can use it as he chooses, the surety is not equitably entitled to have the payments applied to his debt. *Board, etc., of Redwood County v. Citizens' Bank*, 67 Minn. 236.

TAXATION — EXEMPTION — MUNICIPAL PROPERTY. — *Held*, that the bonds of a lighting company given to the city in consideration for its gas plant are not exempt from state taxation as "public property used for public purposes," although the income from them is used in lighting the streets. *City of Frankfort v. Commonwealth*, 82 S. W. Rep. 1008 (Ky.). See NOTES, p. 385.

WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIAN: WAIVER OF PRIVILEGE. — In a contest concerning the validity of a will, a devisee under an earlier will sought to introduce the testimony of the testatrix's attending physician as to her mental capacity. By statute, communications from a patient to his physician were privileged. *Held*, that the evidence is inadmissible. *In re Hunt's Will*, 100 N. W. Rep. 874 (Wis.).

The general rule is that statutory provisions designed for the benefit of individuals may be waived by those entitled to their protection. *State Trust Co. v. Sheldon*, 68 Vt. 259. Hence it is agreed that the patient may waive the privilege. See *Thompson v. Ish*, 99 Mo. 160, 176. There is a conflict, however, with regard to the existence of this

right after the patient's death. In some jurisdictions it is extended to his personal representatives and devisees, and in others to his heirs. *Fraser v. Jennison*, 42 Mich. 206; *Winters v. Winters*, 102 Ia. 53. On the other hand, the court above confines the right to the patient alone. This result seems sound. As the court points out, the purpose of the statute is personal — to encourage full and confidential disclosure to the physician of all facts necessary to a proper treatment. To this end it is essential that after the patient's death the seal of secrecy should remain unbroken. While it is true that an executor represents the deceased, he does so only with regard to rights of property, and not with reference to those which pertain to person and character. *Westover v. Etna, etc., Co*, 99 N. Y. 56.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

BASIS OF LIABILITY OF PRINCIPAL FOR ACTS OF AGENT WITHIN THE APPARENT SCOPE OF HIS AUTHORITY. — Considerable discussion has arisen among text-writers as to the ground on which a principal is to be held liable for acts of his agent within the apparent scope of his authority. Mr. Ewart bases liability solely on estoppel. **EWART, ESTOPPEL BY MISREPRESENTATION.** In answer to this view, which is supported by a number of authorities, a recent article maintains that the principal is held on a purely contractual basis. "*Agency by Estoppel*," by Walter Wheeler Cook, 5 Columbia L. Rev. 36 (Jan. 1905).

The writer, after laying down the rule of contracts that expressed assent governs and secret intention unexpressed is ineffective, states the proposition that one may make a contract by expressing intention through an agent as well as by letter. Further, although the agent's authority is only apparent, yet the principal is bound by the intention expressed, not on the ground of estoppel but because in law they are the words of the principal. In short, his result is, that a person representing his agent to be clothed with certain authority, thereby manifests an intention to be bound by the acts of such agent, and where a third party enters into an agreement with the agent, the principal is bound by this manifested intention, even though it is contrary to the instructions given the agent. Finally, he points out that in the case where the third party enters into an executory agreement and has done nothing to alter his position, the two theories do not lead to the same result; for under the estoppel theory neither party would be bound. Unfortunately no case is cited deciding this question, although the law is stated to be that both parties are bound. Probably no decision has involved the point. It might further have been pointed out that under the estoppel theory, as the estoppel would not bind the third party, he could never be bound unless the principal ratified before the third party chose to withdraw, although that precise case does not seem to have arisen. Again the two theories would reach different results where the third party had no knowledge of the apparent scope of the authority and so could not be said to rely on any representations.

The article illustrates the danger of this unsatisfactory phrase, "apparent authority." At times it is used by the courts and text-writers to mean what is better termed "incidental authority," and then again is extended to cases where the only ground of liability seems to be estoppel. As an example of the former, a person in charge of a store may be said to have "incidental authority" to sell any of the goods, in spite of private instructions to the contrary. However, if X is appointed my agent only to sell my black horse, but I tell Y that X is authorized to sell my white horse and then X gets my white horse without my knowledge and sells it to Y, it would seem clear that X was not really my agent at all, and yet I am estopped to deny it. Some of Mr. Cook's language is broad enough to include such a case within apparent authority. If he means that, then logically he should go the next step and say that even where X has never been appointed my agent for any purpose, but I tell Y that he is my agent and Y deals

with him in that capacity, there too I am liable on principles of contract by manifesting my intention through an agent. The objection to that is, that it is making X my agent or mouthpiece when perhaps I have expressly told him that he should not be. It is saying that actual agency is not necessary in law, and that legal agency is created whenever I lead third parties to believe that X is my agent whether that is in fact true or not. That would be raising another fiction in the law to swell the already numerous collection of phenomena. However the article as applied to apparent authority in the sense of "incidental authority," is clearly sound.

Mr. Cook is not the first to advocate this contractual liability theory of the principal for the acts of the agent within the apparent scope of his authority. The same view was suggested a number of years ago by Mr. Everett V. Abbot. *The Nature of Agency*, 9 HARV. L. REV. 507, 516.

THE RECOGNITION OF FOREIGN JUDGMENTS. — In a recent article the vexed question of the extent to which recognition is to be awarded to foreign judgments is concisely and ably discussed. *To What Extent should Judicial Action by Courts of a Foreign Nation be Recognized?*¹ by the Hon. Mr. Justice Kennedy, 6 J. Soc. Comp. Leg. N. S. 106. After dwelling briefly upon the general desirability of giving effect as far as possible to foreign judgments, Judge Kennedy considers various classes of judgments with reference to their availability for such recognition. Final judgments *in personam*, he believes, are entitled to recognition whenever they have been pronounced by courts of competent jurisdiction, and their recognition will not produce effects contrary to public policy. He adheres, however, to the common law rule that a judgment obtained by fraud is not entitled to recognition. And, unless there can be a convention among states for the codification of rules concerning competence of jurisdiction, he is unwilling to accept any compromise with the continental doctrine that the question of fraud can be raised only in the court rendering the judgment. He adds that a foreign judgment offered to sustain the defense of *res adjudicata* should be deemed conclusive if it was rendered on the merits and was not obtained by fraud or upon a statute of limitations peculiar to the *lex fori*.

After noting the fact that judgments *in rem* obtained in good faith and pronounced by competent tribunals are conclusive everywhere, the writer takes up the difficulties in the way of uniformity in the recognition of foreign decrees affecting *status*, particularly marriage and divorce. As regards these, in view of the lack of agreement among courts as to the legal principles to be applied, two suggestions only are offered. The first of these is that no court other than that of the place of celebration should be regarded as competent to make a valid decree nullifying a marriage. The other is the strict rule that a decree of divorce should not be recognized if granted by any court other than that of the matrimonial domicile. This is qualified, however, by the generally acknowledged exception in the case of a wife deserted by her husband who was, up to the time of the desertion, domiciled within the jurisdiction of the court rendering the decree.

Judge Kennedy next points out that while an administrator should be, and usually is, recognized when he comes clothed with the proper authority of the foreign court, a discretionary respect to the wishes of a guardian appointed by a foreign court as to the matters with which he is concerned is all that can be reasonably expected. While expressing the belief that the committee of an insane person appointed by a foreign court should be recognized and *prima facie* should be treated as a person rightly clothed with the powers which the foreign court has purported to give him, he adds that the domestic court should retain the privilege of inquiring into the sanity of the alleged lunatic upon good cause shown. He concludes with a brief discussion of the recognition of foreign judicial action in bankruptcy proceedings. As he points out, there is at present

¹ An Address Delivered at the Recent St. Louis Congress.

great international variance as to the recognition of the title of a foreign assignee as against local creditors, as to the priority *inter se* when there are concurrent and competing bankruptcies, and as to the proper test of competent jurisdiction. Under the circumstances, he believes that the only hope for uniformity in the recognition of the representative of the bankrupt lies in international convention.

HISTORY OF THE DISTINCTIONS BETWEEN TRESPASS, DETINUE, AND TROVER. — "Forms of action are dead, but their ghosts still haunt the precincts of the law" — such is the key-note of an article in the Law Quarterly Review devoted to an historical survey of the origin and development of the action of trover. *Observations on Trover and Conversion*, by John W. Salmond, 21 L. Quar. Rev. 43 (Jan. 1905). The action of trover is founded upon a conversion, which, according to our modern ideas, may occur through an unpermitted taking of chattels, by a wrongful detention of them, or by an unlawful disposition so that neither the owner nor the wrong-doer has any further control over them. Formerly, however, corresponding to these three modes of deprivation, there were three distinct forms of action: trespass, detinue, and trover, the last being of much later origin than the others. Before the remedy of trover existed, its work was done by detinue. When sued for wrongful detainer, the defendant was not allowed to plead that he had unlawfully parted with the goods. The remedy of detinue, however, was an unsatisfactory form of action because the defendant could resort to wager of law, "a form of licensed perjury which reduced to impotence all proceedings in which it was allowable." In much the same way that *indebitatus assumpsit* replaced the older action of debt, trover replaced detinue. The declaration in the two forms of action was practically the same, except that in trover a conversion was charged, while in detinue a wrongful detention was alleged. Mere detention was not a conversion in the original sense; but neglect or refusal to deliver up a chattel after demand was evidence of a conversion, which was deemed conclusive if the failure to deliver was not justified. When this step was taken trover and detinue became alternative remedies, for every detention after demand was then a fictitious conversion on which the plaintiff might bring his action in trover, and so avoid the disadvantages of detinue. This fiction is so firmly established that it would be less confusing now to drop the old technical pleader's distinction and hold that a wrongful detention is a conversion and not merely evidence of it.

In the declaration of trover, the allegation of loss and finding was regarded from the first as immaterial. Therefore when goods were taken and converted, the plaintiff had an election either to sue in trespass for the taking, or, waiving the trespass, to sue in trover for the conversion. When trover was thus brought for what was in truth a trespass, the unlawful taking was regarded as a sufficient and conclusive proof of conversion, for the taker was held to be in the same position as one who detains goods after demand. Had the law developed logically it would have maintained that an unlawful taking is merely evidence of a conversion just as an unlawful detention is.

In every case of wrongful taking, therefore, the plaintiff might elect between trespass and trover; and in case of detention, between detinue and trover. Thus it will be seen that trover, from its early restricted application, has extended its sphere of influence over the realms of both trespass and detinue, furnishing a remedy wherever a plaintiff seeks redress for a wrongful deprivation of his goods, whether by way of taking, detention, or conversion, using the last term in its original and proper sense.

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- ACT OF STATE. I. *Satya Chandra Mukerji*. 1 Allahabad L. J. 249.
 "AGENCY BY ESTOPPEL." *Walter Wheeler Cook*. 5 Columbia L. Rev. 36. See *supra*.
 ALASKAN BOUNDARY CASE. *J. M. Dickinson*. 38 Am. L. Rev. 866.
 ALIEN EXCLUSION. *Blackburn Esterline*. Discussing the federal legislation upon the subject and the decisions of the U. S. Supreme Court as to the constitutionality of this legislation. 38 Am. L. Rev. 836.

- COMPENSATION TO RESCUERS: A QUESTION OF CONTRIBUTORY NEGLIGENCE. *Thomas W. Shelton*. Discussing facts and circumstances which should be considered in determining whether one who rescues another from death is contributorily negligent. 10 Va. L. Reg. 671.
- COMPULSORY LICENSES TO WORK PATENTED INVENTIONS. *James Roberts*. Discussing recent English legislation. 6 J. Soc. Comp. Leg. N. s. 82.
- CONDITION DES PERSONNES MORALES ÉTRANGÈRES D'APRÈS LA JURISPRUDENCE BELGE, LA. *Prosper Pouillet*. Examination of Belgian decisions, as to the status of foreign artificial persons. 31 J. du Droit Internat. Privé 820.
- CONSTRUCTION OF AUTHORITIES TO ADOPT. *P. R. G.* Discussing authority given to widow by deceased husband under Indian law, to adopt a son. 14 Madras L. J. 231.
- CONSTRUCTION OF GIFTS TO A CLASS, THE. *John S. Mackay*. Discussing whether the rule of *Andrews v. Partington* is law in Scotland. 12 Scots L. T. 139.
- DECADENCE OF EQUITY, THE. *Roscoe Pound*. Asserting that equity is fast losing its distinctive features as distinguished from a system of law. 5 Columbia L. Rev. 20.
- DEFINITION OF LAW. *Melville M. Bigelow*. Criticising and demolishing piecemeal Blackstone's definition of law, and substituting another in its place. 5 Columbia L. Rev. 1.
- DEVELOPMENT OF THE JUDICIAL SYSTEM IN RHODE ISLAND, THE. *Amasa M. Eaton*. 14 Yale L. J. 148.
- DOCTRINE FRANÇAISE DU MARIAGE DANS LE CONFLIT DES LOIS, LA. I. *Émile Stocquart*. Examining the history of the French rule that a Frenchman's marriage must be in accordance with French law, no matter where celebrated. 31 J. du Droit Internat. Privé 785.
- ÉTUDES SUR LES EFFETS INTERNATIONAUX DES JUGEMENTS. PREMIÈRE ÉTUDE, IV. *Et. Bartin*. The jurisdiction of the foreign tribunal as a condition of the order to execute its judgment. 31 J. du Droit Internat. Privé 802.
- HARTER ACT, THE. *John C. Walker*. Discussing the decisions under the first three sections of the act. 38 Am. L. Rev. 843.
- LAW OF BANKING IN SOUTH AFRICA, THE. I. *George T. Morice*. The first of a series to deal with the differences between the English and the Roman-Dutch law of banking. 21 South African L. J. 355.
- LEGITIMATE AND ILLEGITIMATE MODES OF WARFARE. *James Beresford Atlay*. 6 J. Soc. Comp. Leg. N. s. 10.
- LEGITIMATION BY SUBSEQUENT MARRIAGE. *Sir Dennis Fitzpatrick*. A codification of existing law, domestic and foreign, with arguments for and against the common law, written in aid of contemplated legislation in Jamaica. 6 J. Soc. Comp. Leg. N. s. 22.
- LIABILITY OF A MASTER TO THIRD PERSONS FOR THE NEGLIGENCE OF A STRANGER ASSISTING HIS SERVANT. *Floyd R. Mechem*. 3 Mich. L. Rev. 198.
- MAINTENANCE OF THE OPEN SHOP, THE. *Bruce Wyman*. A review of the decisions, concluding that the liability of labor unions for procuring the discharge of non-union laborers is an application of the law of conspiracy. 17 Green Bag 21.
- MAKING OF THE GERMAN CIVIL CODE, THE. *A. Pearce Higgins*. Brief history of German law and explanation of how the national spirit made possible its unification in the Code of 1896. 6 J. Soc. Comp. Leg. N. s. 95.
- MARRIED WOMEN'S PROPERTY LAW IN ONTARIO. I. Introduction. *George S. Holmestead*. 25 Can. L. T. 1.
- MODERN "DROIT D'AUBAINE," THE. *Simeon E. Baldwin*. An article recommending that the right of levying a succession tax be restricted to one state. 14 Yale L. J. 129.
- MORAL CONSIDERATION IN PENNSYLVANIA. II. *Joseph P. McKeehan*. 9 Dickinson, Forum 25.
- OBSERVATIONS ON TROVER AND CONVERSION. *John W. Salmond*. 21 L. Quar. Rev. 43. See *supra*.
- OLD ROMAN CODE AND A MODERN AMERICAN CODE, THE. II. *Joseph H. Drake*. 3 Mich. L. Rev. 185.
- "PRINCIPAL'S LIABILITY FOR ACTS OF HIS AGENT, A." *Anon.* Discussing state of English authorities on question of unauthorized acts not for the benefit of principal. 27 L. Students' J. 7.
- PRIVILEGES OF AMBASSADORS AND FOREIGN MINISTERS. *Charles Noble Gregory*. 3 Mich. L. Rev. 173.
- QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR, SOME. VIII. The Rights and Privileges of Belligerent Armed Vessels in Neutral Ports. *Amos S. Hershey*. 16 Green Bag 814.
- RELATION OF THE INSANITIES TO CRIMINAL RESPONSIBILITY AND CIVIL CAPACITY, THE. IV. *Sir John Batty Tuke* and *Charles R. A. Howden*. 16 Jurid. Rev. 361.

- REMISSION OF PERFORMANCE. *Dinshah Fardonji Mulla*. Discussing the subject under the Indian Contract Act, 1872. 6 Bombay L. Rep. 227.
- REPORT OF THE DEPARTMENTAL COMMITTEE ON WORKMEN'S COMPENSATION, THE. I. *Alexander Moncrieff*. Review and criticism of the report of the committee appointed to consider amendments to the Workman's Compensation Act of 1897. 16 Jurid. Rev. 393.
- RIGHT OF EMINENT DOMAIN, THE. *Charles Gaudet*. Showing limitations on the right of eminent domain and remedies for failure to comply with the limitations. 3 Can. L. Rev. 669.
- RULE OF COMPARATIVE INJURY IN THE LAW OF INJUNCTION, THE. *Glend Burke Slaymaker*. A discussion of the doctrine that an injunction will not be issued if the good that may result is not commensurate with the harm. 60 Cent. L. J. 23.
- SALE OF PART OF A MASS, THE. *O. S. Bryant*. Discussing the possibility of title passing before separation and concluding that the buyer can become a tenant in common if the parties so intend. 60 Cent. L. J. 4.
- SCIENTIFIC SCHOOL OF LEGAL THOUGHT, A. *Melville M. Bigelow*. Advocating a closer study of economic conditions and commercial usages. 17 Green Bag 1.
- SCOTTISH CHURCH CASE, THE. *James Ferguson*. Discussing the recent case before the House of Lords. 16 Jurid. Rev. 347.
- SHOULD THE GRANTEE OF A LOPE-MINING CLAIM BE CONFINED WITHIN THE VERTICAL BOUNDARIES OF HIS CLAIM? *John A. Ewing*. Maintaining that an amendment confining a grantee within the vertical boundaries of his claim would not simplify the present confused state of mining law. 12 Am. Law. 540.
- SHOULD THE SUNDAY LAWS OF OUR COUNTRY BE CHANGED TO MEET THE DEMANDS OF OUR COSMOPOLITAN POPULATION? *Irving E. Campbell*. Answering the question in the negative. 10 Va. L. Reg. 682.
- SOURCES OF SCOTS LAW, THE. *William C. Smith*. 16 Jurid. Rev. 375.
- SPECIAL ASSESSMENT PRACTICE. *George A. Mason*. Summarizing the law of Illinois upon special assessments, with some practical suggestions as to conducting cases. 37 Chic. Leg. News 171, 179.
- SURETYSHIP FROM THE STANDPOINT OF COMPARATIVE JURISPRUDENCE. *Henry Anselm De Colyar*. A brief comparative summary of the principles of suretyship as exemplified in the Roman, English, and American Law and the modern Codes Civil. 6 J. Soc. Comp. Leg. N. s. 46.
- TERM "POLICE POWER," THE. *J. M. Blayney, Jr.* 59 Cent. L. J. 486.
- TIME BARGAINS IN STOCKS AND PRODUCE. *Ernest J. Schuster*. "An enquiry into the rules under which speculative bargains in stocks and produce have been treated as gaming or wagering transactions under the laws of different countries." 6 J. Soc. Comp. Leg. N. s. 121.
- TO WHAT EXTENT SHOULD JUDICIAL ACTION BY COURTS OF A FOREIGN NATION BE RECOGNIZED? *Mr. Justice Kennedy*. 6 J. Soc. Comp. Leg. N. s. 106. See *supra*.
- WARRANTY IN THE ENGLISH LAW OF SALE. II. *Richard Brown*. 26 Jurid. Rev. 406.

II. BOOK REVIEWS.

THE MONROE DOCTRINE. By T. B. Edgington. Boston: Little, Brown and Company. 1904. pp. vi, 344. 8vo.

Although the Monroe Doctrine has had a considerable history, and is moreover of present and vital interest, our permanent literature on the subject is distinctly meager. From the very fact that the doctrine is of current importance, so continually referred to in periodical publications, so constantly discussed, it is probable that the majority of Americans feel no need of books to tell them its history and meaning. Yet it is doubtful if the knowledge of most of us in regard thereto is so accurate that we would not be glad to find under some single cover a convenient discussion of the doctrine from its inception to its most recent developments. This Mr. Edgington has attempted to give us.

Mr. Edgington has covered the field broadly. The volume commences with an interesting discussion of the origin of the Monroe Doctrine. It is shown to have been an early political principle of the United States, rather than an out-

growth of President Monroe's message to which its birth is commonly ascribed, and its annunciation by Monroe is proved to have been prompted by Mr. Canning, then Foreign Secretary of Great Britain, in the course of his endeavors to frustrate the schemes of the Holy Alliance, for the reconquering of South America. Mr. Edgington then takes up the various diplomatic crises connected with the Monroe Doctrine from the early boundary disputes, down to the recent financial irresponsibility of Venezuela. In so doing he gives a generous amount of space to the history of the Spanish-American republics, their political conditions, and their foreign policy as illustrated by the Calvo Doctrine. In addition there are chapters on the question of coaling stations, and on the Hague Tribunal and assimilated conferences in this hemisphere, as viewed in connection with the foreign policy of the United States. The book closes with a number of suggestions for the more convenient enforcement of the Monroe Doctrine by means of a possible reformation of South American misgovernment. It will be seen, therefore, that the author furnishes his readers with a quantity of valuable information which they might otherwise have had to go far to obtain.

But though Mr. Edgington has made something of his opportunity, it seems undeniable that he has failed to make the most of it. Both the usefulness and the interest of his book are marred by serious faults in construction. Although the book was presumably intended as a unit, the chapters are disjointed and their relation to one another and to the subject is not always clear. The point of view changes in a most baffling manner. In addition the chapters are ill-arranged. Thus the historical development is interrupted without warning by the chapter on coaling stations, which, since it serves no purpose but to explain a scheme of the author's for the settlement of international questions raised thereby, belongs logically with his other suggestions at the end of the book. Matter is sometimes introduced, which, though not uninteresting in itself, has only the most remote connection with the doctrine under discussion. Madame de Krüdener, whose life is given at some length, is about as important a figure in connection with the history of the Holy Alliance, as that alliance is in connection with a discussion of the Monroe Doctrine. But perhaps the most patent defects are the repetitions. For example, at p. 55 an entire chapter is devoted to the calling of the Panama Congress by Simon Bolivar, and the probable endeavor of John Quincy Adams and Henry Clay to form a secret treaty among all the republics of the western hemisphere. On pp. 108 and 109 the subject is again explained. On pp. 261 and 262 it is explained for a third time. Moreover the second and third explanations are almost identical, though the author has experimented a little with the paragraphing. For another instance of identical repetition see pp. 172 and 177. When the opportunity was so great as in the present case for a work of real excellence, such defects can only be most sincerely regretted.

A. H.

OUTLINES OF THE LAW OF BAILMENTS AND CARRIERS. By Edwin C. Goddard. Chicago: Callaghan & Company. 1904. pp. xiv, 250. 8vo.
 SELECTED CASES ON THE LAW OF BAILMENTS AND CARRIERS, including the quasi-bailment relations of carriers of passengers and telegraph and telephone companies as carriers. By Edwin C. Goddard. Chicago: Callaghan & Company. 1904. pp. iv, 742. 8vo.

These are companion volumes, designed primarily for the use of students. There is a certain convenience in this arrangement; in the text book are set forth the foundation principles of this branch of the law; while in the case book are nothing but the principal cases. It is now pretty generally agreed among teachers of law that when students are sent to read the cases, the less indication in the case book of the subject of any particular case, or of the principle in any group of cases, the better; for in order to get the greatest benefit from such work the student should be thrown wholly upon his own resources. By this scheme of having a separate text book all of the annotation and most of the subdivisions are taken out of the case book. But whether the student will have

self-control enough to refrain from getting his first information from the text book is a question.

The scope of the author's subject is to be remarked. It covers more than the traditional carriers of goods and of passengers; it includes innkeepers and warehousemen, telegraph and telephone companies. The common undertaking that the editor finds here is that of bailment; either the relation is that, or something like that. It is true that these callings have historically been treated upon the basis of bailment; but the fact remains, as the commentator himself recognizes by his phrase quasi-bailment, that in many of these undertakings the relation is not that of bailment. The real unifying principle that justifies the treatment of all of these callings together is that of public service. In all of these undertakings, and in many more, there is the obligation to serve all that apply with adequate facilities, for reasonable compensation and without discrimination. This, indeed, is affirmed by the author, who in the case of each of these callings devotes a section to establishing the public duty involved. Whatever is peculiar in the topics that the editor has under discussion, and whatever is common to them, are to be explained by this law governing public calling rather than by the law of bailment. It may be agreed, then, that the editor is doing a distinct service by calling attention, by the extent of the scope of his work, to the fact that the carrier is not an isolated instance, but a representative of a class.

As to the way in which the matters are worked out in these books, one could wish to see more generalization in place of the author's practice of treating each business entirely by itself; but perhaps in the present state of the law this would be dangerous, if not impossible. In regard to the execution of the books one could wish that the range of choice in selecting the cases were larger. However efficiently the editors of the *American Decisions*, the *American Reports*, and the *American State Reports* may be thought to have done their work, it is hardly safe for an author to consider that they have overlooked nothing; and it is obvious that many important cases have not been included in these books by reason of this limitation in the editor's search. As to one other detail, it would seem to be better in arranging footnotes to put the cases in the alphabetical order of the jurisdictions, which is now the accepted method.

When all is said against compression, one always turns first by preference to a terse hand book like the present, where he will find the general principle succinctly stated and well illustrated by a few pertinent examples. B. W.

A TREATISE ON DAMAGES, covering the Entire Law of Damages both generally and specifically. By Joseph A. Joyce and Howard C. Joyce. In three volumes. New York: The Banks Law Publishing Co. 1903-4. pp. clxxv, 1-855; cliv, 856-1726; cxxxvii, 1727-2669. 8vo.

The existence of two treatises as well known and of as great merit as Sedgwick on Damages and Sutherland on Damages, renders the task of an author or authors who essay the same field not an easy one. The authors of the newest work have presented a very creditable and a useful treatise. It cannot be said that the scientific study of the law has been very much advanced by their work, but there is little question that the practising lawyer will be aided.

The division of the work into chapters is different from that in Sedgwick or in Sutherland; and the division does not seem to present advantages over that in the older works. Too much space has been given to the law of damages as applicable to tort actions for personal injuries. About one-fourth of the entire work is devoted to discussion of damages in cases of death by wrongful act. Though this is an extremely important subject, and one on which the practitioner needs to be informed, it is fair to say that its difficulty and importance do not seem to warrant giving up so large a part of a general work on damages to it. On these points, the authors' opinion differs from that of the reviewer, for they state in the preface, "Inasmuch as actions to recover damages for personal

injuries and for death of a human being have occupied so largely in excess of others the attention of the courts, the authors have given to them the space and prominence which their proper consideration necessitates."

It would seem, too, that the general principles of the law of damages have not been discussed with as much fullness as is desirable before entering on particular applications, and that some questions not strictly within the law of damages are included, as for example in Title II. The important subject of consequential damages in its general aspects and apart from particular applications, is not treated at great length, nor is the subject of damages for breach of contract fully developed. It is a matter of regret that the authors have not availed themselves of the opportunity, open to them by the failure of the older treatises, to give us help on the question of damages for "anticipatory breach."

Considerable attention has been paid to the matter of damages for mental suffering, but here again the discussion is scattered among the various classes of cases in which the question may arise.

On the matter of damages for personal injuries or for death, this work should make a place for itself, and be of incalculable assistance to the triers of tort cases. For example, in the note on pages 240-262 inclusive, a collection is made of cases in which the question raised was whether or not the verdicts rendered were excessive. The authors have classified the cases under the heads of particular injuries, and have given for each case a concise but sufficient statement of facts to allow the practitioner to see at a glance the bearing and effect of the case.

Roughly, 20,000 cases have been cited in the work. This is a smaller number than are cited in Sutherland, but somewhat larger than in Sedgwick. The citations are well arranged, alphabetically by states and chronologically within each jurisdiction, the latest decision being put first. Citations are made to all unofficial reports and collections, as well as to official reports. In the front of each volume is a table of contents of that volume, and a list of the cases cited in the volume. In that respect the arrangement is similar to that of the other large treatises on damages. At the end of the third volume is an index digest of the whole work.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XVIII. For the year 1904. Borough Customs. Volume I. Edited by Mary Bateson. London: Bernard Quaritch. 1904. pp. lix, 356. 4to.

This is the first attempt to bring together the borough customs of England or to set them forth so that they may be compared and studied. The Selden Society deserves commendation for having undertaken to recover the customary law from the municipal archives and for having selected an editor so well fitted to do the work. It is probably safe to say that no collection of materials of more importance for the study of the borough institutions of England has ever been published; it is a substantial contribution to our knowledge of municipal as well as legal history.

The general scope of the work is explained in the introduction as follows: "The present volume is confined to the jurisdiction of the borough court and its procedure. A few further points of procedure and rules of merchant law will be treated in the next volume, but the main themes of the second volume will be the rules of family law and rules which define the relation between the seignorial and ecclesiastical powers on the one hand and the burgesses on the other. The laws of borough elections and what may be called the constitutional laws of the boroughs, and the laws and customs of trades, are excluded from our scheme, partly from exigencies of space, partly because the comparative method seems to be less suited to their case." The exclusion of the constitutional laws is to be regretted. What we need is a corpus of borough law, including all its main branches; it would be a great boon to scholars if the Selden Society would extend the scope of this collection of texts and give us three or four volumes of borough customs instead of two.

It is difficult to set forth or analyze the contents of the volume before us, for

many topics are dealt with, and there was much diversity in the customary law of the various towns. The reader will be struck by the survival of many archaic usages and old legal principles in the boroughs, such as the blood-feud, extrajudicial distress, compurgation, various barbarous forms of punishment such as drowning, burial alive and burning, and the requirement that the prosecutor or appellant should act as executioner. Writers are often inclined to exaggerate the progressive spirit of the medieval municipalities, but in some respects municipal custom was much more conservative than the common law. This volume is particularly rich in new material relating to the older modes of proof and to the attitude of the burgesses toward judicial combat and trial by jury. In the interesting section concerning the assize of fresh force the editor surmises that the forty weeks named in the London Liber Albus as the limit of time within which this action may be brought is a mistake for forty days; but the period of forty weeks is again mentioned in Letter Book C (ed. Sharpe, p. 146), and the same period seems to have been recognized by the customs of Oxford (Jenks, Reports 21), which were modelled after those of London. The only extract relating to the writ *ex gravi querela* is taken from a customal of Lincoln (1480); references to passages of much earlier date will be found in 18 HARV. L. REV. 130.

It is difficult, however, to discover omissions or flaws in Miss Bateson's work; she is a thoroughly competent editor; her industry, learning, and remarkable knowledge of the sources of municipal history deserve the highest praise. We look forward with interest to the publication of the second volume, in the introduction of which she proposes to inquire into the significance of the texts which she is editing.

C. G.

STUDIES IN BIBLICAL LAW. By Harold M. Wiener. London: David Nutt. 1904. pp. xi, 128. 8vo.

So slight has been the direct influence of the code of the Pentateuch upon the development of our law, despite the intensely Puritan movement that swept over the English race in the seventeenth century, that Mr. Wiener's book, though written from a lawyer's point of view, is of more interest to the layman than to the law student. It is an "attempt to apply the ordinary methods of legal study to the solution of Biblical problems," and, despite the taint of the professional fallacy that only lawyers can reason, is both novel and interesting.

The first part of this little volume is devoted to a vigorous, if not potent, criticism of the higher criticism of the Bible, in which Ewald, Renan, and Driver are "refuted" to the author's satisfaction. The method employed is an ingenious and skillful application of the principles of legal interpretation to texts in apparent conflict, and the results are at least more plausible than those usually obtained by such as seek to reconcile scientific theorizing and Biblical exegesis.

Of greater interest is Mr. Wiener's theory that the covenant at Sinai is a religious treaty, drawn up with all the technical formalities of early Hebrew contracts. When Jacob and Laban enter into a pillar-covenant at Galeed, the attending formalities are a pillar, and a heap of stones as "witnesses," an oath, sacrifices, and feasts. Similarly, at Sinai, we find a bilateral agreement made with all the "covenant" formalities, — altar, and pillars as witnesses, oath, sacrifice, and feasts, — and the entire process is paralleled at the Deuteronomic repetition. The writing and stone tablets are not the vehicles for expressing the contract, but are additional "witnesses," which accords well with what is known of the primitive law of evidence, among the Franks and the Lombards.

In the chapter on the "Spirit of Legislation," the author labors to relieve the Biblical criminal code from the reproach of inhumanity frequently cast upon the *lex talionis*, by proving an implied system of fines as a permissive alternative to the literal rigor of the law. But he ignores both the Semitic ideas of justice in the tribal stage of development while still dominated by the early law of blood revenge, and the administration of justice amidst roving and warlike tribes whose laws for personal security are, of necessity, brutally strict. Compensation by payment of a fine, instead of the mutilation of the offender's person, which is found in the earliest stages of Teutonic law, is a late development

among Semitic peoples. Otherwise Mr. Wiener's defense of the Biblical code, and the comparison with the code of Hammurabi, and the Roman law, make one regret the brevity of the chapter.

I. G.

A TREATISE ON THE LAW OF WILLS, including also Gifts Causa Mortis, and a Summary of the Law of Descent, Distribution, and Administration. By John R. Rood. Chicago: Callaghan & Co. 1904. pp. lxvi, 635. 8vo.

The body of this work is made up of four principal titles, "Gifts Causa Mortis," "Wills," "Descent and Distribution," and "Administration of Estates." The subject of wills, which occupies more than two-thirds of the text, is treated at length, and includes a somewhat detailed discussion of construction. The other topics are more briefly treated, presenting broad outlines of the subjects discussed, without entering into a minute study of the complications which arise in practice. The historical matter incorporated, the space devoted to introductions, and the constant repetition of the analytical scheme of the book, seem to indicate, in so condensed a treatise, that the writer is addressing the student rather than the practitioner. Though at times verbose, he has covered the details more fully than the available space would lead one to expect. The citations are mainly confined to leading cases, and this results in an unusually large proportion of English authorities. On important points, the summaries of statutes and decisions in the various states seem careful and complete. The practice of citing on each point the annotations which are to be found in standard collections of cases will prove useful. Although the author, in discussing some well-known points of conflict, seems a trifle overconfident as to the weight of authority, the tone of the book is conservative. It can claim no especial distinction for originality, but its scope is broad enough, and its treatment sufficiently reliable, to make it a very useful practical handbook.

AN OUTLINE OF MUNICIPAL GOVERNMENT IN THE CITY OF NEW YORK. By George Arthur Ingalls. Albany, N. Y.: Matthew Bender, 1904. pp. 79. 16mo.

The municipal government of Greater New York has such manifold and intricate features that Mr. Ingalls has, perhaps, rendered some service in presenting, through a hasty but rather compendious survey, its important parts. A concise exposition of the political position of the city in the state government is followed by a detailed summary of the powers, duties, etc., of the various branches and departments of the city administration. This little book will relieve the ordinary person, in search of information, from turning to the repellant bulky volume containing the New York Charter, but its sketchy outline is hardly intended for the practitioner. A dealing with the numerous legal questions which constantly arise with reference to the charter was foreign to the modest purpose of this volume.

VENEZUELAN ARBITRATIONS of 1903, including protocols, personnel and rules of commissions, opinions, and summary of awards, with appendix containing Venezuelan Yellow Book of 1903, Bowen Pamphlet entitled "Venezuelan Protocols," and "Preferential Question," Hague decision, with history of recent Venezuelan Revolutions. Prepared by Jackson H. Ralston and W. T. Sherman Doyle. Washington: Government Printing Office. 1904. pp. xxviii, 1105. 8vo.

THE DICTIONARY OF LEGAL QUOTATIONS; or, Selected Dicta of English Chancellors and Judges from Earliest Periods to the Present Time. Extracted mainly from reported decisions, and embracing many epigrams and quaint sayings. With explanatory notes and references. By James William Norton-Kyshe. London: Sweet and Maxwell, Limited. 1904. pp. xxi, 344. 8vo.

- A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS created under the "Business Corporation Acts," of the several states and territories of the United States. By Thomas Gold Frost. Boston: Little, Brown, and Company. 1905. pp. xlv, 622. 8vo.
- SELECT STATUTES CASES AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660-1832, with a supplement from 1832-1894. Edited by C. Grant Robertson. New York: G. P. Putnam's Sons. London: Methuen & Co. 1904. pp. xviii, 452. 8vo.
- THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XIX. For the year 1904. Year Books of Edward II. Vol. II. 2 & 3, Edward II. A. D. 1308-9 and 1309-10. Edited by F. W. Maitland. London: Bernard Quaritch. 1904. pp. xix, 244. 4to.
- YEAR BOOK OF LEGISLATION, 1903. Edited by Robert H. Whitten. Digest of Governor's Messages, Summary and Index of Legislation, Review of Legislation, 1903. Albany: New York State Education Department 1904. pp. 771. 8vo.
- STREET RAILWAY REPORTS ANNOTATED. Reporting the Electric Railway and Street Railway Decisions of the Federal and State Courts in the United States. Edited by Frank B. Gilbert. Vol. II. Albany, N. Y.: Matthew Bender. 1904. pp. xix, 1051. 8vo.
- THE HINDU WILLS ACT (Act XXI of 1870), with which is incorporated the Probate and Administration Act, with elaborate notes and commentaries. By Mahendra Chandra Majumdar. Calcutta: Sanyal & Co. 1904. pp. lvi, 824. 8vo.
- THE ORGANIZATION AND MANAGEMENT OF BUSINESS CORPORATIONS. By Walter C. Clephane. St. Paul, Minn.: West Publishing Co. 1905. pp. xxvi, 246. 8vo.
- REPORT OF SEVENTH ANNUAL MEETING OF THE COLORADO BAR ASSOCIATION. 1904. pp. 198. 8vo.

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No. 6

HOW FAR AN ACT MAY BE A TORT BE- CAUSE OF THE WRONGFUL MOTIVE OF THE ACTOR.

AS a precedent *Allen v. Flood*¹ has been made harmless by the later decision in *Quinn v. Leatham*.² But certain *dicta* in the prevailing judgments in the earlier case, by reason of the prominence of the judges who gave them, may have a considerable and, as it seems to the present writer, a mischievous influence. He ventures, therefore, to point out what he conceives to be the fallacy of two of the most important of these *dicta*.

The first is this remark of Lord Watson: ³

"Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong." The other is a statement by Lord Macnaghten: ⁴ "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice

¹ [1898] A. C. 1.

³ [1898] A. C. 92.

² [1901] A. C. 495.

⁴ [1898] A. C. 151.

towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse."

In opposition to these generalizations, the true rule, it is submitted, may be formulated as follows: The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was just cause for inflicting the damage; and the question whether there was or was not just cause will depend, in many cases, but not in all, upon the motive of the actor.

The motive to an act being the ultimate purpose of the actor is rightful if that purpose be the benefit of others or of himself, wrongful if the purpose be damage to another. An act may be a tort, notwithstanding the rightful motive of the actor, because the end does not justify the means. Such torts, however, are beyond the scope of the present paper. The soundness of the *dicta* quoted from *Allen v. Flood* must be tested by cases in which the actor in wilfully causing damage to another was dominated by a wrongful motive. We shall find that these cases fall into three groups: (1) Cases in which the wrongful motive has no legal significance, the actor, by general judicial opinion, being subject to no liability at law, however severe the judgment against him in the forum of morals; (2) Cases which have divided judicial opinion, some courts deciding that the actor should be charged because of his wrongful motive, others ruling that he should not be charged, notwithstanding his wrongful motive; (3) Cases in which it is generally agreed that the actor should be charged because of his wrongful motive.

First group. A defendant who has caused damage to the plaintiff and been actuated in so doing by the most reprehensible motives escapes liability if the plaintiff is suffering only the consequences of his own breach of duty. For example, the plaintiff refuses to leave the defendant's house, when requested, whereupon the defendant puts him out by force;¹ or the defendant removes the plaintiff's encroaching fence;² or his wrongful obstruction to the flow of a stream;³ or turns the plaintiff's trespassing horse into the highway where it is lost or stolen.⁴ It makes no difference that the defendant, in doing these acts, was taking

¹ *Oakes v. Wood*, 2 M. & W. 791, 794, *per* Parke, B.; *Kiff v. Youmans*, 86 N. Y. 324 (*semble*); *Brothers v. Morris*, 49 Vt. 460.

² *Smith v. Johnson*, 76 Pa. St. 191.

³ *Clinton v. Myers*, 46 N. Y. 511.

⁴ *Humphrey v. Douglass*, 11 Vt. 22.

advantage of the opportunity to gratify a vindictive spirit, and would not have done them otherwise. It is still true that he was merely putting an end to the plaintiff's tort. Similarly, a creditor pursues his debtor with all the rigor of the law in order to ruin him, although he knows that with some indulgence he would realize more himself and enable his debtor to avoid bankruptcy;¹ or in a spirit of malevolence he sues a trespasser.² Here again the malevolent motive of the defendant is legally of no significance. The debtor and the tort-feasor were legally bound to pay and cannot claim damages because they were brought into court for the breach of their duty.³ The action is refused in these cases, notwithstanding the reprehensible motive of the defendant, because the court could not without stultifying itself punish him for enforcing his absolute legal rights against his debtor or the wrongdoer.

In other cases the wrongful motive of the actor is ignored for a different reason. An English judge said from the bench to one of the parties: "You are a harpy, preying on the vitals of the poor." It was admitted that the words were false and spoken for the sole purpose of injuring the person addressed. The latter brought an action against the judge, but was unsuccessful.⁴ A witness gave perjured testimony for the sake of defeating one of the parties to the suit. There was no redress against him at the suit of the person injured by his perjury.⁵ It is believed to be for the public interest that neither judge, juror, party, counsel, nor witness should be called to account in a civil action for words spoken while filling those characters. The same absolute privilege extends to speeches in legislative assemblies.⁶

¹ *Morris v. Tuthill*, 72 N. Y. 573; *Friel v. Plummer*, 69 N. H. 498; *South Bank v. Suffolk Bank*, 27 Vt. 505.

² *Jacobson v. Von Boenig*, 48 Neb. 80.

³ Baron Parke's oft-quoted *dictum* (*Stevenson v. Newnham*, 13 C. B. 285, 297): "An act which does not amount to a legal injury, cannot be actionable because it is done with a bad intent" was given in a similar case. The defendant was sued for maliciously distraining for more rent than was due. But the count did not allege that the distress was excessive, that is, was unreasonably large for the rent actually due. If the defendant took by distress no more goods than might properly be taken, his motive in taking them was irrelevant. *Hamilton v. Windolf*, 36 Md. 301, is a similar case.

⁴ *Scott v. Stansfeld*, L. R. 3 Ex. 220.

⁵ *Dampert v. Simpson*, Cro. El. 520.

⁶ The head of an executive department of the government enjoys a similar immunity from a civil action for his official conduct. *Spalding v. Vilas*, 161 U. S. 483. Nor will an action lie for a malevolent removal of a subordinate official by a superior invested with the power of removal. *Rosenbaun v. Gillian*, 101 Mo. App. 126.

Anyone may speak or write defamatory words of another, and in the most contemptible spirit of vindictiveness, if he simply tells the truth. This rule works very harshly sometimes, but it is thought to be for the public welfare that men should appear in their true colors.¹

An innocent man is subjected to a criminal prosecution by one who acted from the purest malevolence. Nevertheless, if he had reasonable grounds for believing the party prosecuted to be guilty, no action will lie against him for his malevolent conduct.² Here, again, the interest of the private individual must give way to the public good. It is for the interest of the community that all persons believed on reasonable grounds to be criminals should be prosecuted, whatever the motive of the person instigating the prosecution. In all these cases and others that might be mentioned the defendant escapes liability, not from any regard for him, but by reason of the paramount consideration of the public welfare.

Second group. There is much divergence of judicial opinion as to the liability of the owner of land for using it, not for any benefit to himself, but purely to the detriment of his neighbor. The typical illustrations of such conduct are the sinking of a well by the owner, not in order to get water for himself, but solely for the purpose of draining his neighbor's spring, or the erection by the owner on his land, but near the boundary, of an abnormally high fence, not for any advantage of his own, but merely to darken his neighbor's windows or to obstruct the view. In England it seems to be settled that the owner may act in this malevolent manner with impunity.³ In France and Germany the owner is liable in tort in each case.⁴ In this country there is a strange inconsistency in the reported decisions. In thirteen of the fifteen

¹ Odgers, Lib. & Sl., 3d ed., 202. See the analogous case of *Lancaster v. Ham-burger* (Ohio, 1904), 71 N. E. Rep. 289. By statute in Delaware, Florida, Illinois, Louisiana, Maine, Massachusetts, Nebraska, New York, Rhode Island, West Virginia, and possibly in a few other States, the truth of a libel is no defense to an action, unless it was published with a proper motive.

² *Foshay v. Ferguson*, 2 Den. 617; 1 Ames & Smith, Cas. on Torts 548, 549, *n.* 1.

³ *Mayor v. Pickles*, [1895] A. C. 587; *Capital Bank v. Henty*, 7 App. Cas. 741, 766.

⁴ Draining of spring: *Badoit v. Andre*, Cour de Lyon, April 18, 1856, Dalloz 56, 2, 199; *Barré v. Guilhaumon*, Cour de Montpellier, July 16, 1866, Sirey 67, 2, 115 (*semble*); *Forissier v. Chavrot*, Cour de Cassation, June 10, 1902, Sirey, 1903, 1, 11; *G. v. F.*, O. A. G. zu Jena, Nov. 29, 1878, 35 Seuff. Arch. No. 273 (*semble*). Spite fence: *Doerr v. Keller*, Cour de Colmar, May 2, 1855, Dalloz 56, 2, 9; *G. v. F.*, O. A. G. zu Jena, Nov. 29, 1878, 35 Seuff. Arch. No. 273 (*semble*); *Marcus v. Bose*, O. L. G. zu Darmstadt, June 5, 1882, 37 Seuff. Arch. No. 292 (*semble*).

jurisdictions in which the question has arisen the courts have declared that the malevolent draining of a neighbor's spring is a tort.¹ On the other hand in six of the ten states in which actions have been brought for the malevolent erection of a spite fence, the opinion of the court was against the plaintiff.²

That the conduct of the defendants in these cases is unconscionable no one will deny. That they should be forced to make reparation to their victims, unless paramount reasons of public policy forbid, would seem equally clear. But the absence of such reasons is evident from the fact that in France and Germany and so many of our states the courts have allowed reparation, and from the further fact that in at least six³ states statutes have been passed making the erection of spite fences a tort.⁴ Such legislation is

¹ *Katz v. Walkinshaw*, 141 Cal. 116; *Cohen v. La Canada Co.*, 142 Cal. 437; *Roath v. Driscoll*, 20 Conn. 533, 540, 543, 544; *Barclay v. Abraham*, 121 Ia. 619; *Gagnon v. French Co.* (Ind. Ap. 1904), 72 N. E. Rep. 849; *Chesley v. King*, 74 Me. 164; *Stevens v. Kelley*, 78 Me. 445, 452; *Greenleaf v. Francis*, 18 Pick. 117, 119 (*seem*); but see *Walker v. Cronin*, 107 Mass. 555, 564, and *Plant v. Woods*, 176 Mass. 492, 499; *Stillwater Co. v. Farmer*, 89 Minn. 58; *Springfield Co. v. Jenkins*, 62 Mo. Ap. 74; *Bassett v. Salisbury Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439, 447; *Franklin v. Durgee*, 71 N. H. 186; *Smith v. Brooklyn*, 18 N. Y. Ap. Div. 340, 160 N. Y. 357, 361; *Forbell v. New York*, 164 N. Y. 522; *Wyandot Co. v. Sells*, 3 Oh. N. P. 210 (question left open in earlier case in Supreme Court, *Frazier v. Brown*, 12 Oh. St. 299, 303, 304); *Wheatley v. Baugh*, 25 Pa. St. 528, 533; *Lybe's App.*, 106 Pa. St. 626, 632; *Williams v. Ladew*, 161 Pa. St. 283, 287, 288; *Miller v. Blackrock Co.*, 99 Va. 747 (*seem*). The only decisions to the contrary are in Vermont and Wisconsin. *Chatfield v. Wilson*, 28 Vt. 49; *Huber v. Merkel*, 117 Wis. 355.

² *Russell v. State* (Ind. Ap. 1904), 69 N. E. Rep. 482; *Bordeau v. Greene*, 22 Mont. 255; *Brostrom v. Lampp*, 179 Mass. 315; *Mahan v. Brown*, 13 Wend. (N. Y.) 261; *Auburn Co. v. Douglas*, 9 N. Y. 447, 450 (*seem*); *Adler v. Parr*, 34 N. Y. Misc. Rep. 482; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Letts v. Kessler*, 54 Oh. St. 73 (reversing s. c. 7 Oh. C. C. 108); *Metzger v. Hochreim*, 107 Wis. 267. The opposite view obtains in Michigan, New Hampshire, Oklahoma, and Pennsylvania. *Burke v. Smith*, 69 Mich. 380; *Flaherty v. Moran*, 81 Mich. 52; *Kirkwood v. Finegan*, 95 Mich. 543; *Horan v. Byrnes*, 72 N. H. 93; *Smith v. Speed*, 11 Okla. 95; *Haverslick v. Byrnes*, 33 Pa. St. 368 (*seem*).

³ Connecticut, Maine, Massachusetts, New Hampshire, Vermont, and Washington. There is a similar statute in Wisconsin against the malevolent draining of a neighbor's spring.

⁴ The courts which deny compensation for the damage inflicted by a spite fence proceed upon the assumption that the owner of land, by virtue of his ownership, has an absolute right to erect such a fence. But there are many limitations upon the right of ownership at common law, and, it is submitted, there is no difficulty in principle in limiting an owner's right so far that he shall not be permitted to use his land in a particular way with no other purpose than to damage his neighbor. If, in truth, the owner's right is absolute in this respect, how can it be taken away from him by statute? Such a statute was held unconstitutional in *Huber v. Merkel*, 117 Wis. 355. See also *Western Co. v. Knickerbocker*, 103 Cal. 111, 115. But the opposite view was taken in *Rideout v. Knox*, 148 Mass. 368, and *Karasek v. Peier*, 22 Wash. 419.

likely to spread, so that ultimately the cases in this second group will belong in the third group.¹

Third group. Coming now to the cases in which an actor's liability for intentional damage to another is determined by the motive with which he acted, let us take first the case of malicious prosecution. The plaintiff, an innocent man, has been subjected to a criminal prosecution for theft. The defendant, who instituted the prosecution, although having no reasonable ground for his belief, did honestly believe the plaintiff to be guilty of the theft. Is the defendant liable for the damage suffered by the plaintiff? If he acted from a sense of public duty to bring a supposed criminal to justice, then, blunderer though he was, his conduct is justifiable. If, on the other hand, his object was to punish the plaintiff for marrying the woman whom he himself had hoped to make his wife, or to satisfy some other grudge, his conduct was inexcusable. Here, certainly, the motive or object of the actor converts an act otherwise lawful into a tort. We may suppose again that a defendant publishes a fair and accurate report of a judicial proceeding which contains matters defamatory to the plaintiff, a minister. If this is done simply by way of giving news to the public, the plaintiff has no remedy. He has to suffer for the general good of the community. If, however, the defendant, solely from ill-will to the plaintiff, should print the report for the purpose of discrediting the plaintiff as a candidate for a call to a certain church, the plaintiff could charge him in tort for the damage caused by the publication.² Here also it is the defendant's motive or object which makes him a wrongdoer.

A French case furnishes another illustration. The plaintiff by planting certain crops had attracted a great amount of game to his country estate, and invited several of his friends from

¹ The discontinuance of a service at will or the refusal to employ a man, to make a lease to him, to buy his goods, to lend him money, to recommend him as a servant, will give him no cause of action, however great the damage to him or however malevolent the attitude of the party refusing to gratify his wish. *Allen v. Flood*, [1898] A. C. 100, 152, 172; *London Co. v. Horn*, 206 Ill. 493, 504; *Heywood v. Tillson*, 75 Me. 225, 230; *Collins v. American Co.*, 68 N. Y. App. Div. 639. But these and similar cases are foreign to the present discussion, which relates to possible torts. The refusals just mentioned cannot be torts, for they are not acts but failures to act. They would not be mentioned but for the fact that this fundamental distinction between a malevolent act and a malevolent non-feasance appears to have been overlooked by several of the judges in *Allen v. Flood*, *supra*, 100, 152, 172.

² *Stevens v. Sampson*, 5 Ex. Div. 53, Odgers Lib. & Sl. (3d ed.) 292.

Paris for a day's hunt. The neighbor of the plaintiff, irritated by the latter's success, ordered his servants to make so much noise on his own land as to frighten away the game and so spoil the day's sport. He was made to pay damages to the plaintiff.¹ It is obvious, however, that if the neighbor, while hunting himself, had disturbed the hunt of the plaintiff by the noise of his dogs and guns, no action would have lain against him. The neighbor had just as much right to hunt as the plaintiff. Lord Holt took the same distinction in a similar English case.² His language is much to the point: "Suppose the defendant had shot in his own ground, if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing and a wrong."³

Two decisions, one in France and one in Belgium, are especially instructive. In each case an employer threatened to discharge his employees if they traded with the plaintiff. In the one case the plaintiff kept a saloon which had exercised a demoralizing effect upon the defendant's workmen. The latter's prohibition against his men frequenting the plaintiff's saloon was held justifiable as a reasonable measure of discipline.⁴ In the other case the plaintiff was a political rival of the defendant, and the latter used his workmen as a means of ruining the plaintiff's business. In this case judgment was given for the plaintiff.⁵ It will be observed that in each of these cases the damage to the plaintiff was caused by the act of a single individual, and not by a combination of persons; that in each case the defendant used neither fraud nor force, but merely the pressure of a threatened loss of place, and that in each case the workmen were under no obligation to trade with the plaintiff. The two cases illustrate in a very convincing manner how the motive with which an act is done may determine its lawfulness or unlaw-

¹ *Prince de Wagram v. Marais*, Cour de Paris, Dec. 2, 1871, Dalloz 73, 2, 185.

² *Keeble v. Hickeringill*, 11 East 574, n., Holt 14, 3 Salk. 9, 11 Mod. 74, 130 S. C.

³ 11 Mod. 70.

⁴ *Reding v. Kroll*, Trib. de Luxembourg, Oct. 2, 1896, Sirey 1898, 4, 16. "Les défendeurs auraient certainement abusé de leur droit, et, dès lors, commis un acte quasi-délictueux, s'il était établi, comme le demandeur l'affirme en termes de plaidoirie, que leur défense ne repose sur aucune nécessité de discipline ouvrière, qu'elle a été portée malicieusement et par pur esprit de vengeance."

⁵ *Dapsens v. Lambret*, Cour d'Appel de Liège, Feb. 9, 1888, Sirey 1890, 4, 14. "Attendu qu'on ne saurait admettre qu'il soit permis, même par des actes licites absolument parlant, de ruiner un citoyen sans autre intérêt ou mobile que celui de la vengeance; qu'alors le *summum jus* devient la *summa injuria*."

fulness. A similar distinction has been made in cases in this country brought against employers who induced their workmen not to trade with the plaintiff.¹

Similarly, whether employees, who, by threatening to strike, induce an employer not to engage the plaintiff or retain him in a service terminable at the employer's will, are guilty of a tort, may depend upon the motive of the defendants. If they objected to working with the plaintiff because his incompetency would expose them to danger, or because of his depraved character, no action would lie against them.² If on the other hand their motive was to wreak their vengeance upon him for his conduct towards them, they must pay the damages inflicted upon him by their conduct.³

¹ *Chipley v. Atkinson*, 23 Fla. 206, 216-217; *Graham v. St. Charles Co.*, 47 La. An. 214, 1657; *Internat. Co. v. Greenwood*, 2 Tex., Civ. Ap. 76. The decision in *Payne v. Western Co.*, 13 Lea (Tenn.) 508, is *contra*, but two of the five judges dissented, and the effect of the case as a precedent is nullified by statute. Shannon's Code, Supp. 285. *Raycroft v. Tayntor*, 68 Vt. 219, is distinguishable. The defendant having quarrelled with the plaintiff was warranted in objecting to his presence upon his land, although his objection required one of his own employees to choose between continuing in his service, and declining to employ the plaintiff as an assistant. The decision in *Heywood v. Tillson*, 75 Me. 225, is not open to question, for the defendant's conduct was a legitimate mode of protecting the interests of himself and his employees. But some of the *dicta* of the court are unsatisfactory and at variance with the decision in *Chesley v. King*, 74 Me. 164.

² *Giblan v. Nat. Union*, [1903] 2 K. B. 600, 617, 619; *Heywood v. Tillson*, 75 Me. 225, 232; *Commonwealth v. Hunt*, 4 Met. (Mass.) 111, 130; *Nat. Prot. Ass'n v. Cumming*, 170 N. Y. 315.

³ *Giblan v. Nat. Union*, [1903] 2 K. B. 606; *Joost v. Syndicat des Imprimeurs*, Cour de Cassation, June 22, 1892, *Sirey* 93, 1, 41; *Joost v. Syndicat*, Cour d'Appel de Chambéry, March 14, 1893, *Sirey* 93, 2, 139; *Oberle v. Syndicat des Ouvriers*, Cour d'Appel de Lyon, March 2, 1894; *Dalloz* 94, 2, 305; *Monnier v. Renaud*, Cour de Cassation, June 9, 1896, *Dalloz* 1896, 1, 582. In *Giblan v. Nat. Union*, *supra*, *Romer, L. J.*, said, pp. 619-620: "In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered." In *Joost v. Syndicat*, *supra*, *Sirey* 93, 2, 139, the court said: "Attendu que sans doute les ouvriers syndiqués avaient de leur côté le droit de se mettre en grève; mais qu'il n'est permis à personne d'abuser de son droit; qu'il y a abus d'un droit toutes les fois que celui qui prétend l'exercer n'agit que dans le but de nuire à autrui sans aucun intérêt pour lui même." In *Monnier v. Renaud*, *supra*, the case turned upon the point whether the defendant had been promoting "un intérêt professionnel" or had been influenced by "un sentiment de malveillance injustifiée."

As a rule, however, the ultimate object of a labor union in excluding an employee from work by pressure upon the employer, or in injuring the business of an employer

In the case supposed by several of the judges in *Allen v. Flood*,¹ the liability of the cook, who induced the master to dismiss the butler by threatening to leave himself if the butler were retained, should depend upon the motive of the cook. If the two were thrown together, and if the butler by his character or personality was distasteful to the cook, the latter, with a view to his own interest would be justified in calling upon the master to choose between them. If, on the other hand, the cook, having no objection to the butler as a companion, procured his dismissal from pure malevolence, his conduct would be tortious.²

An Illinois decision³ illustrates the legal significance of the motive of a defendant who caused damage to the plaintiff by moral coercion upon the conduct of a third person. The defendant, an insurance company, had contracted by its policy to indemnify a manufacturer against liability for claims for injuries to his employees. The plaintiff was an employee who had been injured in the course of his employment. The defendant company recognized its liability, but disputed the amount demanded and threatened to have the employee discharged unless he accepted in full satisfaction the small amount offered. The employee refusing to yield, the company induced the employer to discharge the employee by threatening to exercise its right to cancel the policy. The plaintiff recovered substantial damages. The court said, however, that if the company had procured in this manner the dismissal of an employee, who by his bad habits or incompetency was likely to increase the risk of the company, such conduct would have been justifiable as a reasonable measure of self-protection.

In a Louisiana case the plaintiff, an innkeeper who was also an assessor, had irritated the defendants by what they conceived to be an excessive valuation of their property. Purely to avenge this

by the persuasive or coercive boycott, is not the damage to their victim, but the advancement of the cause of labor. This motive, of course, is commendable. In the great majority of labor cases, therefore, the question whether the members of a labor union are guilty of a tort is a question, not of motive, but of the legal validity of the means adopted for effectuating their motive; and this question must be answered by a careful weighing of considerations of public policy.

¹ [1898] A. C. 36, 57, 138-139, 165-166.

² The case seems to be covered by the following language of Mr. Chief Justice Holmes: "We cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether by false slanders or successful persuasion, is an actionable tort." *Moran v. Dunphy*, 177 Mass. 485, 487.

³ *London Co. v. Horn*, 206 Ill. 493.

supposed grievance they persuaded certain commercial travellers to discontinue their patronage of the plaintiff's hotel. They were compelled to pay him substantial damages.¹

To divert to one's self the customers of a rival tradesman by the offer of goods at lower prices is, in general, a legitimate mode of serving one's own interest and justifiable as fair competition. If, however, a man should start an opposition shop, not for the sake of profit for himself, but, regardless of loss to himself, for the sole purpose of driving the plaintiff out of business and with the intention of retiring himself immediately upon the accomplishment of his malevolent purpose, would not this wanton causing of damage to another be altogether indefensible and a tort? Such a case is not likely to arise, but several judges have expressed the opinion that the defendant in such a case would have to make reparation.²

A close friend of a creditor advises him in good faith, that he is likely to lose his claim unless he proceeds without delay to collect it. The creditor acts on the advice, presses his claim, and the debtor is ruined, whereas, if he had received indulgence for a short time, an expected favorable turn in his affairs would have enabled him to weather the storm. Grievous as this loss is, he cannot hold the creditor's adviser responsible. But would there be any doubt as to his responsibility if he had given the same advice with full knowledge of the debtor's situation and for the sole purpose of ruining him?

The illustrations already given can hardly fail to convince the reader that Lord Macnaghten's *dictum*, quoted at the opening of this paper, is untenable, and that there are many torts arising from the defendant's inducing a third person to act in such a way as to damage the plaintiff, although the defendant used neither fraud, force, nor defamation, and although the conduct of the third person was altogether lawful. The instances mentioned prove also how often the tortious quality of an act depends upon the motive of the actor. But other examples may be suggested.

¹ Webb v. Drake, 52 La. An. 290. Delz v. Winfree, 80 Tex. 400, is a similar case.

² Lord Coleridge in Mogul Co. v. McGregor, 21 Q. B. D. 544, 553; Lord Bowen, s. c. 23 Q. B. Div. 598, 618; Lord Morris, s. c. [1892] A. C. 49; Lord Field, s. c. 52; Lord Halsbury in Allen v. Flood, [1898] A. C. 1, 77; opinion of court *per* Wells, J., in Walker v. Cronin, 107 Mass. 555, 564; Holmes, J., in May v. Wood, 172 Mass. 11, 15; opinion of court *per* Hammond, J., in Plant v. Wood, 176 Mass. 492, 498; Taft, J., in Moores v. Bricklayers Union, 23 Oh. W. L. Bull. 48, 51, 52. But see *contra* Passaic Works v. Ely, 105 Fed. Rep. 163, Sanborn, J., diss.; Auburn Co. v. Douglass, 9 N. Y. 444, 450, *per* Selden, J.; Nat. Ass'n v. Cumming, 170 N. Y. 315, 326.

To put poisoned food upon one's own land in order to kill a skunk gives no cause of action to one's neighbor, although the neighbor's dog eats the food and dies from the poison. But it has been decided in South Carolina that the neighbor may have an action if the defendant, knowing that the plaintiff's dog was in the habit of coming upon his premises, exposed the poisoned food for the express purpose that the dog might eat it and die.¹

To deposit rubbish in the highway would not ordinarily subject the depositor to an action at the suit of a private individual; but if the defendant placed it there in order to cause loss to the plaintiff, who was bound by contract with the town to keep the highway in good condition, we should all agree with the Connecticut court² that he would have to make good the loss to the plaintiff.

To kill a man whose life is insured, although a crime, is not, without more, a tort against the insurance company.³ But the crime would be also a tort to the company if committed for no other purpose than to inflict loss upon the latter.⁴

Other instances in which the success of the plaintiff depends upon the wrongful motive of the defendant doubtless will occur to the ingenious reader. He will find, however, that, in these new instances as well as in those suggested in this paper, it is for the plaintiff to allege and prove this wrongful motive. Generally the allegation must be made in the declaration. But in the case of malevolent publication of reports of judicial proceedings this allegation comes in the reply to the defendant's answer. Those who maintain that the law does not regard motive as an element in a tort are wont to distinguish this case on the ground that the wrongful motive is simply a means of destroying the defense of privileged communication. But this reasoning seems specious rather than sound. For, when the facts of the particular case are developed, it is still true that the defendant is guilty of a tort, and the plaintiff wins solely because the defamation was induced by a wrongful motive.

As the plaintiff succeeds in certain cases of wilful damage by the defendant solely by proof of the actor's wrongful motive, so the defendant sometimes wins, notwithstanding he has wilfully

¹ *Cobb v. Cater* (S. Ca. 1901), 38 S. E. Rep. 114.

² *McNary v. Chamberlain*, 34 Conn. 384.

³ *Ins. Co. v. Brame*, 95 U. S. 754.

⁴ *Conn. Co. v. N. Y. Co.*, 25 Conn. 265, 276; *McNary v. Chamberlain*, 34 Conn. 384, 388; *Gregory v. Brooks*, 35 Conn. 437, 446; 2 *Mugdan*, *Die Gesamt-Materialien zum B. G.* 407.

damaged the plaintiff, solely by proof of a benevolent motive. One who has crossed the plaintiff's land in order to catch a train cannot urge his motive of self-interest as a justification. But if he crossed the land in order to rescue a child playing on the track from imminent peril of being run over by a train, his benevolent motive will be a full defense to an action of trespass.

Occasionally the authorities leave us in the dark as to whether a particular case is to be grouped with those in which the plaintiff must establish a malevolent motive or with those in which the defendant must prove a benevolent motive. Must a plaintiff, for example, in counting against a defendant for inducing a young woman to break her contract to marry the plaintiff allege also that the defendant acted from a malevolent motive, or at least from a selfish motive, or is the question of the motive properly to be raised only by the defendant's allegation that he acted from a benevolent interest in the welfare of his daughter? As a matter of principle it seems to the writer that the plaintiff states a *prima facie* case, and makes a good count by alleging simply that the defendant induced the third person to break her contract, *i. e.*, to do a legal wrong. If this is a correct view, the case has no bearing upon the subject of this paper. Otherwise it is another instance in which a wrongful motive may make an act a tort.

If this essay has accomplished its purpose, it is made clear that the *dictum* that our law never regards motive as an element in a civil wrong is as far from the truth as would be the statement that malevolently to damage another is always a tort. The truth lies in the middle. In certain cases, in spite of the wrongful motive of the actor, malevolently to damage another is lawful, either because the act is merely the exercise of an absolute legal right, or because it is justified by paramount considerations of public policy. Except in such cases, however, wilfully to damage another by a positive act and from a spirit of malevolence is a tort, even though the same act, if induced by a rightful motive, would be lawful.¹

J. B. Ames.

¹ The reader may have remarked that, except in a quotation, the words "malice," "malicious," and "maliciously" have not been used. Malice, as used in the books, means sometimes malevolence, sometimes absence of excuse, and sometimes absence of a motive for the public good. If so "slippery" a word, to borrow Lord Bowen's adjective, were eliminated from legal arguments and opinions, only good would result.

INTERFERENCE WITH CONTRACTS AND BUSINESS IN NEW YORK.

THE immediate results of an intentional interference with the contracts or business of another may be to entice away servants, or to induce the breach, the termination without breach, or the non-formation of contracts. The means by which these results may be accomplished may be either unlawful or lawful. And the motive for seeking to accomplish them may be either unjustifiable or justifiable.

We have then to consider, in any discussion of this tort, the result, the means, and the motive. No doubt seems to exist in any jurisdiction as to the necessity of considering means; doubts have frequently been expressed as to the necessity or propriety of considering motive; a very few jurisdictions make no distinction as to results, considering no one of the above results any more wrongful than the others. In New York it is probably unnecessary to make any distinction as to results; it is always necessary to distinguish as to means; it is probably necessary to distinguish as to motives where only lawful means are used.

Intentionally to produce any of the above results and consequent damages by the use of unlawful means, is itself unlawful whatever the motive. Intentionally to produce any of the above results and consequent damages by the use of lawful means, is probably unlawful if the motive be unjustifiable, but is certainly lawful if the motive be justifiable.

I. Results of Interference with Contracts. In New York no distinction is to be made between contracts of service and other contracts, or between inducing the breach of contracts and inducing the termination or non-formation of them. The only doubt that may be said to exist in this respect is as to whether the enticement of servants stands on any different footing from the interference with the performance of other contracts.

The early cases in New York recognize the common law remedy for the enticing away or harboring of servants with knowledge of

the relation,¹ and some later cases have also adverted to the rule.² But the modern decisions have been mainly hostile to the acceptance of such a doctrine in the case of contract servants.³ It is probably safe to say that the old common law tort of enticing away such servants has been entirely assimilated to the tort of interference with contracts generally, leaving, of course, the question of servants by status untouched. It may, however, require an explicit decision of the Court of Appeals to set the matter entirely at rest.

Inducing the breach of an enforceable contract obligation is not unlawful if no unlawful means be used. This was so stated in the case of *Ashley v. Dixon*.⁴ One Patrick had contracted to sell land to the plaintiff, and plaintiff contracted to sell the same land to the defendant. Subsequently, by offering Patrick more than the plaintiff's contract called for, the defendant induced Patrick to sell and convey the land to him. The court first holds that there is not sufficient evidence of a "conspiracy," or that "Patrick absented himself from home, or refused to perform his contract at the instigation of the defendant," and then says:

"But even if defendant had induced Patrick not to perform his contract, that alone would not make him liable to the plaintiff for damages. He could advise and persuade Patrick not to convey the land, and could, by offering more, induce him to convey to himself, without incurring any liability to plaintiff, so long as he was guilty of no fraud or misrepresentation affecting plaintiff. If A has agreed to sell property to B, C may at any time before the title has passed induce A not to let B have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B; A alone, in such case, must respond to B for the breach of the contract, and B has no claim upon or relations with C. While, by the moral law, C is under obligation to abstain from any interference with the contract between A and B, yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce."

¹ *Scidmore v. Smith* (1816), 13 Johns. (N. Y.) 322; *Stuart v. Simpson* (1828), 1 Wend. (N. Y.) 376. See also *Woodward v. Washburn* (1846), 3 Den. (N. Y.) 369.

² *Haight v. Badgeley* (1853), 15 Barb. (N. Y.) 499; *Caughy v. Smith* (1872), 47 N. Y. 244; *Buffalo Lubricating Oil Co. v. Everest* (1886), 3 How. Pr. N. S. 179; *Davis Machine Co. v. Robinson* (1903), 41 N. Y. Misc. 329.

³ *Johnston Harvester Co. v. Meinhardt* (1880), 60 How. Pr. (N. Y.) 168; *Rogers v. Evarts* (1891), 17 N. Y. Supp. 264; *Foster v. Retail Clerks' Protective Ass'n* (1902), 39 N. Y. Misc. 48; other cases cited herein where inducing employees to quit is held non-actionable.

⁴ (1872) 48 N. Y. 430. To the same effect is *Daly v. Cornwell* (1898), 34 N. Y. App. Div. 27. In the case of *Hoefler v. Hoefler* (1896), 12 N. Y. App. Div. 84, it was held actionable to induce one who had been ordered to pay alimony to the plaintiff not to pay it and to leave the State.

It is interesting to note, first, that neither *Lumley v. Gye*¹ nor *Walker v. Cronin*² is referred to by the court nor, apparently, by the counsel, and, second, that *Ashley v. Dixon* itself has never been cited by the New York Court of Appeals and but rarely by the inferior New York courts.³ While the question of means is expressly referred to in this case the question of motive is left obscure. There seems to be in the mind of the court, however, some recognition of the idea that the inducing of the breach may be justified by the motive of competition for this particular land.

It is, of course, too clear for discussion that if it is non-actionable to induce the breach of a contract, it is non-actionable to induce the termination or non-formation of a contract where no unlawful means are used.⁴

Whether inducing even by unlawful means the non-formation of contracts is an actionable wrong might involve a preliminary question as to the substantial character of the plaintiff's right not to be interfered with. It has been held that merely intercepting even by unlawful means an intended gratuity or an expectation of benefit, is not unlawful.⁵ Whatever may be thought of a contract terminable at will, certainly the possibility or probability of being able to bring about new contracts is a mere expectancy. If logic were to prevail, we might be forced to the conclusion that intercepting by unlawful means the expectation of forming contracts is non-actionable. But even in the leading case,⁶ where it was held non-actionable to induce a testator by false and fraudulent representations to change his will to the damage of the plaintiff, it was recognized that the loss of a gratuity or the loss of prospective customers affords a substantial basis for an action for slander. The court says: "If this description of special damage is to be regarded as the gist and foundation of the action (of slander), I

¹ (1853) 2 E. & B. 216.

² (1871) 107 Mass. 555.

³ It is cited in support of the proposition that the law does not enforce moral obligations in 25 N. Y. St. Rep. 284 and 10 N. Y. Misc. 355. It is cited and applied to similar facts in *Daly v. Cornwell* (1898), 34 N. Y. App. Div. 27. It is to be noted that *Ashley v. Dixon* was decided by the temporary "Commission of Appeals" and not by the regular Court of Appeals. The contract in this case and in *Daly v. Cornwell* seems to have had no relation to a business or occupation.

⁴ *Johnston Harvester Co. v. Meinhardt* (1880), 60 How. Pr. (N. Y.) 168, s. c. 9 Abb. New Cas. (N. Y.) 393; cases cited under III. Lawful Means, *infra*.

⁵ *Hutchins v. Hutchins* (1845), 7 Hill (N. Y.) 104; *Braem v. Merchants' Bank* (1891), 127 N. Y. 508, aff'g 6 N. Y. Supp. 846; *Hurwitz v. Hurwitz* (1894), 10 N. Y. Misc. 353.

⁶ *Hutchins v. Hutchins*, *supra*.

rather think the principle should be regarded as peculiar to that species of injury. . . . But the law applicable to the cases referred to proceeds upon the ground that the plaintiff, by the wrongful act complained of, has been deprived of the present actual enjoyment of some pecuniary advantage. No such damage can be pretended here. At best, the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the plaintiff; or the testator might change his mind, or lose his property."

Without discussing the question of interfering with a mere expectancy, the courts have uniformly held that interfering with the probable formation of contracts stands upon the same footing as interfering with the performance of contracts already formed. If it is actionable to induce a breach of contract it is equally actionable to induce the non-formation of one in New York, provided the means or the motive be the same in both cases. Thus there is no distinction in this respect between contracts of service and other contracts, nor between those in which the obligations are fixed and enforceable and those which carry with them no enforceable obligations or which still rest merely in expectation. Whether a distinction is to be made between an isolated or independent contract and one related to a business or occupation seems not to have been considered, but the cases in which it has been held actionable to interfere by lawful means have all involved the obstruction of a business or occupation.

II. *Unlawful Means.* It is unlawful to induce the breach of a contract by unlawful means. This was adjudged in an early case in which a contract of tenancy having yet eleven months to run was broken by the tenants because, it was alleged, the defendant with intent to damage the plaintiff threatened to seize the tenant's goods unless they would depart the premises and so disturbed the tenants that they abandoned the possession.¹ It was urged in this case that the damage was due to the wrongful act of the tenants in breaking the contract, and that the plaintiff's remedy was solely against them; but the court held that there was also an action against the defendant for the damages intentionally inflicted by him through the unlawful disturbance of the tenants.

It is unlawful to induce the termination of a contract (without breach) by the use of unlawful means. This is dealt with in two

¹ Aldridge v. Stuyvesant (1828), 1 Hall (N. Y.) 210.

cases in which the contract so terminated was unenforceable under the Statute of Frauds. In the first¹ the defendants by false representations induced the other party to believe that the plaintiff did not intend to perform, and were thereby enabled to sell their own goods in place of the plaintiff's. The court held it to be immaterial whether the contract was binding upon the buyer or not, since he would have fulfilled it but for the false and fraudulent representations of the defendants. This case was followed by a later case in which the contract was unenforceable under the Statute of Frauds, and the defendant by a false telegram led the seller to believe that the plaintiff would not perform.² So it is also unlawful to induce another's employees to leave his service by threats, intimidation, or force.³

It is unlawful to induce the non-formation of contracts by unlawful means. It is actionable to induce a plaintiff's customers to refrain from dealing with him by circulating false statements as to his goods or patents and threatening customers with infringement suits,⁴ or by a general boycott involving threats and intimidation,⁵ or by circulating a false statement that he is insane.⁶ It is actionable to prevent persons from entering a plaintiff's employment by force, threats, and intimidation.⁷ But the unlawful act must be the proximate cause of the damage.⁸ Cases involving unfair competition by imitation of trade marks and trade names need not be considered in this discussion.

Whether particular conduct amounts to intimidation is, of course, a conclusion of fact to be gathered from all the circumstances. "There may be cases where persuasion and entreaty are not lawful instruments to effect the purposes of a strike. Even persuasion

¹ *Benton v. Pratt* (1829), 2 Wend. (N. Y.) 385.

² *Rice v. Manley* (1876), 66 N. Y. 82.

³ *Davis v. Zimmerman* (1895), 91 Hun (N. Y.) 489.

⁴ *Lubricating Oil Co. v. Standard Oil Co.* (1886), 42 Hun (N. Y.) 153.

⁵ *Matthews v. Shankland* (1898), 25 N. Y. Misc. 604; *Sun Printing and Pub. Ass'n v. Delaney* (1900), 48 N. Y. App. Div. 623. (In both these cases injunctions *pendente lite* were granted.) But a boycott not involving unlawful means is not unlawful. *Mills v. U. S. Printing Co.* (1904), 91 N. Y. Supp. 185.

⁶ *Green v. Davis* (1903), 83 N. Y. App. Div. 216. See also *Trapp v. Du Bois* (1902), 76 N. Y. App. Div. 314 (libel).

⁷ *Davis v. Zimmermann* (1895), 91 Hun (N. Y.) 489; *Beattie v. Callanan* (1901), 67 N. Y. App. Div. 14, *aff'd* 82 N. Y. App. Div. 7; *Herzog v. Fitzgerald* (1902), 74 N. Y. App. Div. 110. (Injunctions granted.)

⁸ *McDonald v. Edwards* (1897), 20 N. Y. Misc. 523; *Davis v. United Engineers* (1898), 28 N. Y. App. Div. 396 (*semble*).

and entreaty may be used in such a manner, with such persistency, and with such environments, as to constitute intimidation. . . . Whenever the strikers assume toward the employee an attitude of menace, then persuasion and entreaty, with words however smooth, may constitute intimidation."¹ "It should be remembered that to constitute intimidation it is not necessary that there should be any direct threat, still less any actual act of violence. It is enough if the mere attitude assumed by the defendants is intimidating. And this may be shown by all the circumstances of the case, by the methods of the defendants, their circulars, their numbers, their devices."² Intimidation or coercion is not to be implied from the threat to do that which it is lawful for those making the threat to do, as to cause a general strike,³ or to withdraw custom.⁴

Picketing is not *per se* an unlawful means. Since one may use persuasion for justifiable ends he may use it near the entrance to another's place of business as well as elsewhere. Unless he commits a trespass, or obstructs access to a place of business, he may station himself in front of another's store or factory for the purpose of persuading workmen or customers not to deal with that other, and may do this either by oral persuasion or by the distribution of circulars.⁵ The early decision⁶ that picketing and placarding constitute a nuisance must be regarded as no longer law.⁷

¹ Rogers v. Evarts (1891), 17 N. Y. Supp. 264.

² Foster v. Retail Clerks' Protective Ass'n (1902), 39 N. Y. Misc. 48.

³ National Protective Ass'n v. Cumming (1902), 170 N. Y. 315, 328-330. But see argument to contrary in dissenting opinion. "When persuasion ends and pressure begins the law is violated." "A threat with ruin behind it may be as coercive as physical force." In Coons v. Chrystie (1898), 24 N. Y. Misc. 296, it was held that it was coercion for a labor union officer to order members of the union to strike since the members were under fear of a penalty for disobedience, but this has not been suggested in any subsequent decision. In Reynolds v. Plumbers' Protective Ass'n (1900), 30 N. Y. Misc. 709, *aff'd* 53 N. Y. App. Div. 650, it was held that even where members were liable to expulsion for dealing with plaintiff this did not amount to coercion.

⁴ Park & Sons Co. v. Nat. Druggists' Ass'n (1903), 175 N. Y. 1, 20.

⁵ Rogers v. Evarts (1891), 17 N. Y. Supp. 264; Kerbs v. Rosenstein (1900), 56 N. Y. App. Div. 619; Levy v. Rosenstein (1900), 66 N. Y. Supp. 101; Foster v. Retail Clerks' Protective Ass'n (1902), 39 N. Y. Misc. 48; Mills v. U. S. Printing Co., 91 N. Y. Supp. 185, where, however, it is suggested that annoyance or interruption of the peaceful traveler may render picketing unlawful. The decision that pickets were unlawful in Davis Machine Co. v. Robinson (1903), 41 N. Y. Misc. 329, was simply equivalent to the decision that persuasion was unlawful because the motive was unjustifiable. In Park & Sons Co. v. Nat. Druggists' Ass'n, 175 N. Y. 1, spying upon plaintiff's business to discover who furnished him with goods in breach of agreement was held not unlawful.

⁶ Gilbert v. Mickle (1846), 4 Sandf. Ch. (N. Y.) 357.

⁷ Foster v. Retail, etc., Ass'n, *supra*.

Boycotting is not *per se* an unlawful means, and becomes such only when carried out by violence, intimidation, or coercion. "A may refuse to trade with B, unless B changes his policy, and A may think that his attitude is necessary to his own welfare and protection. . . . If A may take this step it does not seem logical to hold that A and C together may not, and may not, by argument, persuasion, and entreaty, bring D and E to their side. If A, C, D, and E cannot do what A alone may lawfully do, the vice must be in the combination. But there is no dissent in our highest courts over the proposition in *National Protective Ass'n v. Cumming* that, 'whatever one may do alone he may do, with others, provided they have no wrongful object in view.' . . . I think that the verb 'to boycott' does not necessarily signify that the doers employ violence, intimidation, or other unlawful coercive means, but that it may be correctly used in the sense of the act of a combination in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the members of the combination, or some of them, or grants concessions which are deemed to make for that purpose. And as such a combination may be formed and held together by argument, persuasion, entreaty, or by the 'touch of nature,' and may accomplish its purpose without violence or other unlawful means, *i. e.*, simply by abstention, I think it cannot be said that *to boycott* is to offend the law."¹

Combinations to do what one may lawfully do introduce no new element of unlawfulness. "Whatever one may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."² "A conspiracy is an agreement to do an unlawful act or to do a lawful act by unlawful means. There can be no conspiracy if the act aimed at is lawful and if the means employed also are lawful. Two or more persons may agree to do what each one of them may lawfully do."³ Hence combined persuasion or combined picketing and persuasion or combined boycott is not unlawful means, and becomes so only when accompanied by threats

¹ *Mills v. U. S. Printing Co.*, 91 N. Y. Supp. 185. See also *Sinsheimer v. United Garment Workers*, 77 Hun (N. Y.) 215; *Foster v. Retail Clerks' Protective Ass'n*, 39 N. Y. Misc. 48.

² *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 321, *aff'g* 53 N. Y. App. Div. 227, 236. See also *Mills v. U. S. Printing Co.*, *supra*.

³ *Foster v. Retail Clerks' Protective Ass'n*, 39 N. Y. Misc. 48, 57.

to do an unlawful act or the actual doing of an unlawful act. Probably the numbers involved would be a circumstance to be considered in determining whether a menacing attitude has been assumed, but not a controlling circumstance. "Picketing may be done in such numbers as to constitute intimidation."¹ It is also probable that motive may be a more important, or at least a more difficult, question in the case of combinations than in the case of a single actor, since a combination may, and often does, include persons whose relation to the end sought is remote.

If the combination constitutes a criminal conspiracy, whether under the Penal Code or under the Anti-Monopoly Act, it is of course illegal, and its acts causing damage to another have been done by unlawful means. Down to 1870 it had been held a criminal conspiracy at common law for workmen to combine to prevent one from working for less than the rate fixed by the combination by imposing penalties of any sort upon the recalcitrant,² or to procure the discharge of a workman because he did not belong to defendants' union.³ From 1830 this was so held under the provisions of the Revised Statutes making it an indictable conspiracy for two or more persons to conspire to commit any act injurious to trade or commerce,⁴ a provision continued and enlarged in the Penal Code of 1882.⁵ But by the act of 1870,⁶ it was provided that this section of the Revised Statutes "shall not be construed to restrict or prohibit the orderly and peaceable assembling or co-operation of persons employed in any profession, trade, or handicraft, for the purpose of securing an advance in the rate of wages or compensation, or for the maintenance of such rate." This has been construed not to warrant a combination to drive a workman out of employment for any reason not connected with the rate of wages,⁷ or to warrant coercion or intimidation in any matter connected with the rate of wages.⁸

¹ *Rogers v. Evarts*, 17 N. Y. Supp. 264, 269.

² *People v. Melvin* (1810), 2 Wheel. (N. Y.) 262, s. c. Yates, Sel. Cas. 112; *People v. Fisher* (1835), 14 Wend. (N. Y.) 9; *Master Stevedores' Ass'n v. Walsh* (1867), 2 Daly (N. Y.) 1.

³ *People v. Trequier* (1823), 1 Wheel. (N. Y.) 142.

⁴ R. S. Pt. IV., Ch. I. tit. 6, § 8, subd. 6; *People v. Fisher*, *supra*.

⁵ Penal Code, § 168.

⁶ L. 1870, c. 19 (now § 170 of Penal Code).

⁷ *People v. Walsh* (1888), 15 N. Y. St. Rep. 17; *People v. Smith*, 10 N. Y. St. Rep. 730, s. c. 5 N. Y. Cr. Rep. 509.

⁸ *People v. Kostka* (1886), 4 N. Y. Cr. Rep. 429; *People v. Wilzig* (1886), 4 N. Y. Cr. Rep. 403.

Combinations to fix the price of commodities are indictable under § 168 of the Penal Code, and § 170 does not apply.¹ Hence a combination to drive plaintiff out of business because he will not join defendants in a combination to fix prices, is a combination for an illegal object, and if plaintiff is damaged by it he is entitled to recover.² It also follows that members of a combination, illegal under the Anti-Monopoly Act, are liable to one who is intentionally interfered with by the combination in the purchase of goods or the conduct of his business.³

III. *Lawful Means.* Assuming a justifiable motive (if that be necessary), it is not unlawful by persuasion, argument, and entreaty, accompanied by picketing, patrolling, or spying, to induce a breach of contract or the termination or non-formation of contract.⁴

Assuming a justifiable motive (if that be necessary), it is not unlawful to refuse to work with another, or to notify the common master of that fact, or to threaten to quit if that other is retained in the employment; and if as a consequence the obnoxious workman is discharged or fails to obtain employment, he has no action for the damages caused thereby.⁵ Nor is it unlawful to refuse to deal with one who refuses to join in a lawful agreement as to the conduct of a particular business or who fails to

¹ *People v. Sheldon* (1893), 139 N. Y. 251; *People v. Milk Exchange* (1895), 145 N. Y. 267; *People v. Duke* (1897), 19 N. Y. Misc. 292.

² *Dueber Watchcase Co. v. Howard Watch Co.* (1893), 3 N. Y. Misc. 582.

³ *L. 1899, c. 690*; *Rourke v. Elk Drug Co.* (1902), 75 N. Y. App. Div. 145; *Straus v. American Publishers' Ass'n* (1904), 177 N. Y. 473.

⁴ *Ashley v. Dixon* (1872), 48 N. Y. 430; *Johnston Harvester Co. v. Meinhardt* (1880), 60 How. Pr. (N. Y.) 168, 9 Abb. New Cas. 393; *Rogers v. Evarts* (1891), 17 N. Y. Supp. 264, aff'd *sub nom.* *Reynolds v. Everett*, 67 Hun (N. Y.) 294, 144 N. Y. 189; *Sinsheimer v. United Garment Workers* (1894), 77 Hun (N. Y.) 215; *Daly v. Cornwell* (1898), 34 N. Y. App. Div. 27; *Reynolds v. Plumbers' Protective Ass'n* (1900), 30 N. Y. Misc. 709, aff'd 53 N. Y. App. Div. 650; *Collins v. American News Co.* (1901), 34 N. Y. Misc. 260, aff'd 68 N. Y. App. Div. 639; *Cohen v. United Garment Workers* (1901), 35 N. Y. Misc. 748; *National Protective Ass'n v. Cumming* (1902), 170 N. Y. 315; *Foster v. Retail Clerks' Protective Ass'n* (1902), 39 N. Y. Misc. 43; *Mills v. U. S. Printing Co.*, 91 N. Y. Supp. 185.

⁵ *Davis v. United Engineers* (1898), 28 N. Y. App. Div. 396; *Tallman v. Gaillard* (1899), 27 N. Y. Misc. 114; *Reform Club v. Laborers' Union* (1899), 29 N. Y. Misc. 247; *Wunch v. Shankland* (1901), 59 N. Y. App. Div. 482; *National Protective Ass'n v. Cumming* (1902), 170 N. Y. 315.

Curran v. Galen (1897), 152 N. Y. 33; *Connell v. Stalker* (1897), 21 N. Y. Misc. 609; *Coons v. Chrystie* (1898), 24 N. Y. Misc. 296, must be distinguished on the ground of unjustifiable motive; *Beattie v. Callanan* (1903), 87 N. Y. App. Div. 7. *Davenport v. Walker* (1901), 57 N. Y. App. Div. 221, is of doubtful authority.

keep such agreement; nor is it unlawful to notify the other members of the association of such non-agreement or violation of agreement.¹

Two Special Term decisions² are the first in New York to discuss broadly in the light of precedents the question of interference with contracts and business. They are both typical cases of striking employees who induce other employees to quit, and prospective employees not to enter, the plaintiff's employment, even paying money to some persons to refrain from entering the employment. The object in both was to resist a decrease in wages or to procure higher wages, and in one to procure the discharge of non-union workmen. There was either no sufficient evidence of intimidation or it was admitted that intimidation, if any, was lawful. In each, the question whether an injunction should issue against persuasion or picketing, or both, resulting in the enticement away of servants and the inability to procure servants, was answered in the negative. There was a denial of any remedy for the mere enticement of servants, and the interference with business was held to be justified upon the ground of competition. The affirmance of these judgments in the higher courts did not go in either case to the merits of the question.

The next step was taken when it was held that the issuing of circulars to the employer's customers requesting them not to deal with the employer until a dispute between him and the employees is adjusted, is not actionable, but is a lawful weapon in the competitive struggle concerning wages.³

Three decisions in cases involving no unlawful means seemed to cast some temporary doubt upon the reasoning and results

¹ *Parks & Sons Co. v. National Druggist Ass'n* (1903), 175 N. Y. 1. See also *Collins v. American News Co.* (1901), 34 N. Y. Misc. 260, *aff'd* 68 N. Y. App. Div. 639.

² *Johnston Harvester Co. v. Meinhardt* (1880), 60 How. Pr. (N. Y.) 168, 9 Abb. New Cas. 393, *aff'd* 24 Hun (N. Y.) 489; *Rogers v. Evarts* (1891), 17 N. Y. Supp. 264, *aff'd sub nom. Reynolds v. Everett*, 67 Hun (N. Y.) 294, 144 N. Y. 189. Justice Walter Lloyd Smith cites and discusses in this case the leading cases in other jurisdictions, such as *Lumley v. Gye* (2 E. & B. 216); *Walker v. Cronin* (107 Mass. 555); and *Mogul Steamship Co. v. McGregor* (L. R. 23 Q. B. D. 598).

³ *Sinsheimer v. United Garment Workers* (1894), 77 Hun (N. Y.) 215. Followed in *Cohen v. United Garment Workers* (1901), 35 N. Y. Misc. 748; *Foster v. Retail Clerks' Protective Ass'n* (1902), 39 N. Y. Misc. 48. But a statement in the circular that plaintiff is insane and unfit to conduct business renders the interference actionable. *Green v. Davis* (1903), 83 N. Y. App. Div. 216. And a boycott which amounts to intimidation of plaintiff's patrons is unlawful. *Matthews v. Shankland* (1898), 25 N. Y. Misc. 604.

of these earlier cases. In one, the plaintiff having refused as treasurer of a union to surrender his books to a committee, the union to which he belonged adopted a resolution that the members refuse to work with him, and he was discharged by his employer in order to induce the other union men to resume work. This was held actionable, either because the case was really one for damages for wrongful exclusion from the union or because the motive for securing his discharge was unjustifiable.¹ In the second, the defendants caused the plaintiff's workmen to quit because the plaintiff would not join an employers' association. This was held actionable, either because the workmen were coerced into quitting by the anticipation of some penalty affixed by their union or because the motive was unjustifiable in that it was not to secure better wages for themselves but to force the plaintiff into joining an association.² In the third,³ the defendants procured the plaintiff's discharge and prevented him from securing other employment because he would not join their union. The answer set up an agreement between the labor union and the employers' union to the effect that all employees should be members of the labor union, and that, in accordance with such agreement, the defendants had simply notified the employer that the plaintiff had refused to join the union. A demurrer to the answer was sustained upon the ground that the agreement to prevent a person from obtaining employment unless he would join a union was unlawful. It is to be noted, however, that in this case the complaint alleged that the defendants procured the plaintiff's discharge "by false and malicious reports in regard to him," and if this was sought to be justified by the answer, the demurrer to the answer should clearly be sustained, since such means cannot be justified at all unless, possibly, under a plea of privilege in analogy with the law of defamation. But these three decisions did not deflect the current of the authorities, and may be

¹ *Connell v. Stalker* (1897), 21 N. Y. Misc. 609, aff'g 20 N. Y. Misc. 423.

² *Coons v. Chrystie* (1898), 24 N. Y. Misc. 296.

³ *Curran v. Galen* (1897), 152 N. Y. 33, aff'g 77 Hun (N. Y.) 610. *Accord*, *Jacobs v. Cohen* (1904), 90 N. Y. Supp. 854. See also *Davis Machine Co. v. Robinson* (1903), 41 N. Y. Misc. 329, where the motive was to compel plaintiff to employ none but union men and picketing and persuasion were enjoined. This case reverts also to the old doctrine that it is unlawful to entice away servants. But compare *Mills v. U. S. Printing Co.*, 91 N. Y. Supp. 185, where an agreement between an employer and a labor union that only union men should be employed was upheld as lawful. It is evident that motive is a material consideration in these apparently conflicting cases.

distinguished, perhaps, upon the ground that the motive in each case was thought to be an unjustifiable one.¹

Following the decisions that it is not unlawful to persuade workmen to quit or not to enter another's employment, came a decision that it is not unlawful to notify the employer that the defendants will not work with the plaintiff under circumstances which naturally lead to the plaintiff's discharge.² The same question arose in the Court of Appeals and was decided in the same way by a vote of four to three.³ The defendants' members refused to work with the plaintiff's members, and so notified the employer through the agency of a walking delegate. The result was to deprive the plaintiff's members of employment. The majority of the court thought that the defendants' conduct was justifiable, either because they desired the work for themselves or because they did not wish to assume the risk of the negligence of the plaintiff's members as fellow-servants. One of the majority distinguishes *Curran v. Galen*⁴ on the ground that the object was there unlawful in seeking to compel the plaintiff to join the defendants' union. The minority think the defendants' conduct amounted to coercion, while admitting that mere persuasion would be lawful.

Another case in the Court of Appeals involved some features similar to those just discussed.⁵ Wholesale druggists formed an association to prevent special rebates by manufacturers to favorite wholesalers. It was agreed by the wholesalers and manufacturers that the goods should be billed to the wholesalers at a

¹ But in *Wunch v. Shankland* (1901), 59 N. Y. App. Div. 482, the motive was to compel the plaintiff to join the defendants' union, and a notice to the employer resulting in the plaintiff's discharge was held not to be actionable. This was decided upon the authority of *Nat. Protective Ass'n v. Cumming*, 53 N. Y. App. Div. 227.

² *Davis v. United Engineers* (1898), 28 N. Y. App. Div. 396. Followed in *Tallman v. Gaillard* (1899), 27 N. Y. Misc. 114; *Reform Club v. Laborers' Union* (1899), 29 N. Y. Misc. 247.

³ *National Protective Ass'n v. Cumming* (1902), 170 N. Y. 315, aff'g 53 N. Y. App. Div. 227. See also *Wunch v. Shankland* (1901), 59 N. Y. App. Div. 482. The statement in *Davenport v. Walker* (1901), 57 N. Y. App. Div. 221, that the threat to strike unless higher wages were paid and only union workmen employed is unlawful, must be regarded as of doubtful authority in view of this and other decisions.

⁴ 152 N. Y. 33.

⁵ *Park & Sons Co. v. National Druggists' Ass'n* (1903), 175 N. Y. 1. See also *Walsh v. Dwight* (1899), 40 N. Y. App. Div. 513; *Tanenbaum v. N. Y. Fire Ins. Exchange* (1900), 33 N. Y. Misc. 134; *Kellogg v. Sowerby* (1904), 93 N. Y. App. Div. 124 (unjust discrimination by railway in combination with plaintiff's rivals). Cases that violate the Anti-Monopoly Act are to be distinguished. *Straus v. Am. Pub. Ass'n* (1904), 177 N. Y. 473.

uniform price fixed by each manufacturer, and those wholesalers who agreed to sell and did sell to retailers at the same price should have a rebate of ten per cent and freight charges, while those who would not agree or would not keep the agreement should get no rebate. The plaintiff would not agree and could not get the rebate. When he obtained goods of other jobbers, a committee which had spied on his business in order to ascertain who these dealers were, notified the manufacturers, who then withdrew the rebate privilege from such dealers. He was unable to get goods which he could sell at a profit in competition with members of the association. It was held that there were no illegal acts by any of the defendants. The jobbers were justified in refusing to deal with manufacturers who would not assent to the arrangement. The manufacturers were justified in refusing to sell to jobbers who would not assent to it. Any member was justified in notifying other members of the fact of the plaintiff's violation of the agreement, or the violation by any other jobber who furnished the goods to the plaintiff, and to this end was justified in keeping the necessary surveillance over the plaintiff's business. Persuasion, notification, picketing, were all lawful means in the competitive struggle. Three judges dissented on the ground of restraint of trade and coercion of the manufacturers by the wholesalers.

A recent case at Special Term¹ reviews fully the New York authorities and states clearly the conclusions to be drawn from them. The conclusions there stated seem to be entirely in accord with the authorities, unless possibly upon the question of motive or justification. In this case the defendants had no interest in the controversy except as sympathizers with the strikers, and the learned justice held that what would be lawful for the strikers would be lawful for any person since, in his view, motive or justification can make no difference in the result. Persuasion, picketing, and placarding are lawful means, and being lawful may be used by any person from any motive and without any color of justification. But a still later case hinges upon the question of motive or justification,² and that question is, therefore, one of the unsettled problems in the New York law.

IV. *Motive or Justification.* The problem of motive and justification in cases where no intrinsically unlawful means are used

¹ *Foster v. Retail Clerks' Protective Ass'n* (1902), 39 N. Y. Misc. 48, *per* Andrews, W. S., J.

² *Davis Machine Co. v. Robinson* (1903), 41 N. Y. Misc. 329, *per* Nash, J.

has been raised expressly or implicitly in several cases, but seems not yet to have been set at rest. Of course there can be no justification if unlawful means are used, unless in the case of a plea of privilege in defamation.

In *Rogers v. Evarts*¹ the difficulty is expressly recognized and the opposing views stated. It is held, however, that "in the case at bar the demand was for an increase of wages. There was no malice in the making of this demand. It was for an advantage in their business which they had the right to seek by all lawful means."

*Curran v. Galen*² distinctly recognizes that motive may be material. A unanimous court declares that if the purpose of an organization be to hamper or restrict the freedom of contract and to coerce workingmen to join the organization and come under its rules, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful. The only coercion, it must be remembered, consists in persuading the employer to discharge the recalcitrant workingman. This distinction is expressly recognized by one of the majority judges in *National Protective Association v. Cumming*,³ where it is pointed out that in *Curran v. Galen* the plaintiff was threatened with being discharged unless he joined the organization, while in this case "there is no such compulsion or motive. There is no malice found. The action was based upon a proper motive, relating to the employment of mechanics whose competency and efficiency had been examined into and approved," and to the securing of employment for members of the defendant organization. The other judge who writes for the majority calls attention to the rule "that intimates that if the motive be unlawful or be not for the good of the organization or some of its members, but prompted wholly by malice and a desire to injure others, then an act which would be otherwise legal becomes unlawful," and adds, "I do not assent to this proposition, although there is authority for it." Granting the existence of such a rule, however, he finds a good motive and sufficient justification in the desire to obtain work for the defendants' members and in their desire not to assume the risk of the negligence of fellow-servants whose

¹ 17 N. Y. Supp. 264.

² 152 N. Y. 33. See also *Beattie v. Callanan*, 87 N. Y. App. Div. 7, where the motive was to compel the plaintiff to recognize the union.

³ 170 N. Y. 315, 334.

competency has not met the tests of the defendant organization. In the same case in the lower court¹ it is said that it would be illegal for the defendants to prevent the plaintiff from earning his livelihood because he would not join the defendant organization. "If that had been the purpose, and if that purpose had been accomplished, the plaintiff would have had a cause of action against those united in its accomplishment."

In *Davis v. United Engineers*,² one justice says: "If a case is presented in which the only motive which impels the interference is to prevent a particular individual from making his living, irrespective of other considerations, a court of equity will interfere where no adequate remedy at law exists. But that is not this case." Another says: "I have no doubt that an action will lie against a person who maliciously induces another to refuse to employ the plaintiff in his business, for the purpose of preventing the plaintiff from earning a livelihood thereby, if it appears that the plaintiff has suffered injury from such action." Still another writes: "The injury necessarily resulted from the success of one competitor in obtaining a contract or employment that others wished to obtain."

Other judicial statements are to the same effect. "A man may threaten to do that which the law says he may do, provided that, within the rules laid down in certain cases, his motive is to help himself. . . . The motive behind the action of each party is self-help."³ "The acts of persons combining or confederating for the purpose of increasing their wages may be lawful, while combinations and acts which have for their object and purpose injury merely to the business of another, without any pecuniary advantage to the persons combining, may be unlawful."⁴ "There is a manifest discrimination, well recognized, between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none others, and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. . . . The difference is between

¹ 53 N. Y. App. Div. 227, 236, 239.

² 28 N. Y. App. Div. 396.

³ *Park & Sons Co. v. Nat. Druggists' Ass'n*, 175 N. Y. 1, 20, 21. See also *Collins v. American News Co.*, 34 N. Y. Misc. 260.

⁴ *Davis Machine Co. v. Robinson*, 41 N. Y. Misc. 329 (holds pickets and persuasion unlawful where there is no question of wages, but merely refusal of plaintiff to employ only union men and discard the premium system in his factory). See also *Davenport v. Walker*, 57 N. Y. App. Div. 221.

combination for welfare of self and that for the persecution of another. . . . Self-protection may cause incidental injury to another. Self-protection does not aim at malevolent injury to another. The law views an injury arising from competition differently from an injury done in persecution."¹

Two or three cases seem to regard motive or justification as immaterial. "It is not unlawful interference with the trade of another to advise people to deal with his competitor or decline to do business with him. . . . The law does not ordinarily consider the motive by which people are actuated in doing lawful acts."² "The strike was a lawful act, whatever motives may have inspired it, so long as it was unaccompanied by violence, threats of violence, intimidation, or unlawful acts of coercion."³ In a recent case two defendants had no interest, other than a sympathetic one, in a strike, but were picketing the plaintiff's store and persuading customers not to patronize him. The justice says: "They have not sufficient interest in the result to justify their act if their act requires justification." He puts the case of C, who advises his friend to patronize one physician rather than another, and proceeds: "It has been sometimes said that . . . if C advises or persuades his friend for the purpose of benefiting one or the other his act is rightful; but if simply for the purpose of injuring the physician it is illegal; if C has an interest to serve in giving his advice he has a right to give it, if not, he has none." He then gives Mr. Justice Holmes's views,⁴ and after discussing the problem with much learning and acumen concludes: "It would always be a question of fact for the jury whether an act otherwise legal was committed with an evil intent. The step should not be taken unless justified by clear weight of authority, and I am not willing to hold that a request not to patronize a certain dealer may be legal if made by a person in one state of mind, or holding one relation to him, and illegal in another."⁵

At least four cases have been decided upon the question of

¹ *Mills v. U. S. Printing Co.*, 91 N. Y. Supp. 185.

² *Reynolds v. Plumbers' Protective Ass'n*, 30 N. Y. Misc. 709. But see *Trapp v. Du Bois*, 76 N. Y. App. Div. 314. These are cases of "black-listing," and are treated substantially as actions for libel.

³ *Herzog v. Fitzgerald*, 74 N. Y. App. Div. 110.

⁴ 8 HARV. L. REV. 1; dissenting opinion in *Vegelahn v. Guntner*, 167 Mass. 92, and in *Plant v. Wood*, 176 Mass. 492.

⁵ *Foster v. Retail Clerks' Protective Ass'n*, 39 N. Y. Misc. 48, 53-55, *per Andrews, W. S., J.*, at Special Term.

motive or justification. In one the motive was to punish the plaintiff for not delivering up certain books as treasurer, and this was held illegal.¹ In another the motive was to compel the plaintiff (employer) to join an association, and this was held illegal.² In a third the motive was to compel the plaintiff (employee) to join the defendants' association, and this was held illegal.³ In still another, picketing was held illegal where the motive was to compel the plaintiff to employ only union men.⁴ In many other cases the court has found the motive to be a justifiable one, and in several it is intimated that the result would be different if the motive were improper or unjustifiable.⁵

In the face of these decisions and *dicta*, it is difficult to escape the conclusion that, while the matter is by no means settled, the trend of opinion, and especially in the appeal courts, is decidedly toward making the question of motive or purpose a material one. But it is probable that the doctrine that "intentionally inflicting harm upon another is actionable, unless it is justified," does not mean in New York that the actor is put to his justification where he has used no unlawful means, but that where only means not unlawful *per se* are used the result is presumably lawful, and this presumption can be overcome only by proof of an unjustifiable motive. In other words, there is presumptively a privilege to employ any lawful means in social or industrial relations; argument, persuasion, and entreaty are lawful means; and the general and common privilege to employ these can be overcome only by showing that they are employed for an unjustifiable end, that is, an end which intentionally inflicts a damage upon a particular individual without a corresponding and compensating advantage to the one who inflicts it or to those whom he represents.

In one case it is said, "It must be assumed, in the absence of

¹ *Connell v. Stalker*, 21 N. Y. Misc. 609.

² *Coons v. Chrystie*, 24 N. Y. Misc. 296.

³ *Curran v. Galen*, 152 N. Y. 33. *Contra*, *Wunch v. Shankland*, 59 N. Y. App. Div. 482. See also *Davenport v. Walker*, 57 N. Y. App. Div. 221, decided upon the authority of *Curran v. Galen*. But compare *Mills v. U. S. Printing Co.*, 91 N. Y. Supp. 185.

⁴ *Davis Machine Co. v. Robinson*, 41 N. Y. Misc. 329. But this is probably not an unjustifiable motive by the weight of New York authority.

⁵ *Rogers v. Evarts*, 17 N. Y. Supp. 264; *Davis v. United Engineers*, 28 N. Y. App. Div. 396; *National Protective Ass'n v. Cumming*, 53 N. Y. App. Div. 227, 170 N. Y. 315; *Collins v. American News Co.*, 34 N. Y. Misc. 260; *Park & Sons Co. v. National Druggists' Ass'n*, 175 N. Y. 1; *Mills v. U. S. Printing Co.*, 91 N. Y. Supp. 185.

specific allegations to the contrary, that the defendants' motive is a lawful one."¹ In another it is said: "Whenever the courts can see that a refusal of members of an organization to work with non-members may be in the interest of the several members, it will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice and to inflict injury upon such non-members. . . . It must appear, in order to make out a cause of action against these defendants, that in what they did they were actuated by improper motives, by a malicious desire to injure the plaintiffs. . . . We may assume that the action of the respondents was based upon a proper motive."²

It must be noted that lawful means usually consist in some communication from the defendant to the person whose conduct is thereby influenced toward the plaintiff to the damage of the latter. Now, if that communication be not defamatory or false there can be no presumption of illegality; it is merely the exercise of a general privilege. If it be defamatory or false there is a presumption of illegality, but this may be overcome by proof of a special privilege, which, in turn, may be overcome by proof of unjustifiable motive. And somewhat as the special privilege is overcome by proof of unjustifiable motive, so the general privilege is overcome by similar proof. Two cases bring out clearly the situation so far as a special privilege is involved.³

While it is manifestly unsafe to attempt to deduce a general principle from the special doctrines of defamatory or false statements, it is at least allowable to use such examples by way of analogy and illustration. The general privilege to use persuasion and argument and the means incidental to these, is not to be regarded as absolute, but conditional. When they are used with the intent to inflict damage upon another, and damage is inflicted, it is permissible for the injured person to show that this was done from an unjustifiable motive, and so overcome the presumption of privilege.

Motive is not, perhaps, the best term to use in this connection. It is too often identified with ill-will or good-will, with bad motive or good motive in the moral sense. But malevolence may not render conduct actionable, nor benevolence render it non-action-

¹ *Collins v. American News Co.*, 34 N. Y. Misc. 260, 263.

² *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 322, 331, 334.

³ *Reynolds v. Plumbers' Protective Ass'n* (1900), 30 N. Y. Misc. 709; *aff'd* without opinion in 53 N. Y. App. Div. 650; *Trapp v. Du Bois* (1902), 76 N. Y. App. Div. 314.

able. A rival trader may have all the malice imaginable against his competitor, and yet be justified in inducing persons not to deal with him. One may act with benevolence toward A and no malevolence toward B, and yet not be justified in inducing persons not to deal with B in order to benefit A. "Want of justification" is, after all, about as apt a phrase as has yet been suggested to convey the idea involved in these cases, although "abuse of privilege" would not be inappropriate. The problem reduced to its simplest terms is whether or not the end justifies the means. For it is the ultimate object that must be kept in mind. The inflicting of damage by persuading persons not to deal with another is very rarely an end in itself. In a sense this is only a means to another end. The gratification of feelings, whether of ill-will or good-will, may be the end sought and accomplished. The securing of a substantial advantage to one's self or to one's organization or to one's friend may be the appointed end. The question of justification resolves itself into this, — does the desire and expectation of accomplishing this particular end warrant the interference with the contracts or business of one who stands in the way of its accomplishment?

If that end be only the gratification of feeling, whether of ill-will or good-will, it is not of that substantial character which justifies inflicting pecuniary loss upon another. To gratify a feeling of malice toward the plaintiff will hardly be thought a justification for inducing third persons not to deal with him. To gratify a feeling of sympathy or good-will toward X will hardly justify inducing third persons not to deal with the plaintiff, unless there be some special relation between X and the defendant which warrants the defendant in acting for X. Even the remote advantage the defendant might derive as one of a large class from the success of X in a competitive struggle with the plaintiff would not be sufficient.¹

Remoteness of result has a double aspect. In an action based upon unlawful means the plaintiff may fail because the resulting injury to him is too remote. A plaintiff is engaged by the X Insurance Co. upon an agreement that he shall secure an employee's surety bond from the Y Guaranty Co. He applies to the guaranty company for a bond and refers to the defendant. The latter makes a false and malicious statement to the guaranty company about him,

¹ If motive is material the decision cannot therefore be sustained in *Foster v. Retail Clerks' Protective Ass'n*, 39 N. Y. Misc. 48.

and the company refuses to give the bond. He is unable to retain his place with the X Co., and brings an action against the defendant for the damages occasioned by the false statement. The damage is held to be too remote from the defendant's tort, because, "between the wrong of the defendant and the damage to the plaintiff, the voluntary act of a third party intervened, and that act was the proximate cause of plaintiff's loss of employment. The insurance company did not discharge plaintiff because of defendant's slander — *non liquet* that the company knew of the slander — but because of the failure of the guarantee company to supply the security."¹ So also, in an action based upon lawful means, the defendant may fail of justification because the end which he alleges justifies the means is too remote to be considered, as where he desires to have his employer join an association with which his union has some agreement, or where he wishes to have an employee join an association of which he is a member.²

It appears, therefore, that even a substantial and lawful end may not warrant the use of the particular means not adapted to the accomplishment of that end. This is familiar doctrine in the tort known as "abuse of process."³ It is also applicable to this tort of "interference with contract." A common and general privilege extended by the law for justifiable ends may be abused by employing it for unjustifiable ends. Thus where the defendant induces an employer to discharge the plaintiff because the latter will not deliver up certain books and accounts to his union, there has been such an abuse of privilege, and the end does not justify the means.⁴

Barring a particular relation which might create a privilege, the general relation which creates it in this class of cases is that of competition. Given a competitive struggle in the large sense between the plaintiff and the defendant and an interference by persuasion with the plaintiff's contracts for the purpose of securing to the defendant a substantial and not too remote advantage in that competition, the end will be held to justify the means. But because the end justifies the means in such cases, it does not follow that the

¹ McDonald v. Edwards, 20 N. Y. Misc. 523. See also Davis v. United Engineers, 28 N. Y. App. Div. 396.

² Coons v. Chrystie, 24 N. Y. Misc. 296; Curran v. Galen, 152 N. Y. 33.

³ Dishaw v. Wadleigh (1897), 15 N. Y. App. Div. 205; Foy v. Barry (1903), 87 N. Y. App. Div. 291.

⁴ Connell v. Stalker, 21 N. Y. Misc. 609.

end justifies the means in cases in which there is no such competition, or in cases where the means are not reasonably adapted to the accomplishment of the end. Motive, therefore, in the sense in which that term is here used, must continue to be an important element in the decision of cases dealing with the interference with contracts and business by persuasion and its incidental aids.

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CORNELL UNIVERSITY, COLLEGE OF LAW.

THE CLOSED MARKET, THE UNION SHOP, AND THE COMMON LAW.¹

THE power of co-operation of man with man enables him to obtain much that would be otherwise unattainable. The constant increase of this power is essential to the continued progress of the race. At the same time it is inevitable that new forms of business co-operation should also cause the appearance of new forms of oppression in the business world. This is what is now taking place as the result of industrial changes. From the point of view of the public, we have new methods by which a trade or business may be monopolized; from that of the individual, we have new methods of unfair trade competition. A question which the layman has a right to put to the lawyer, and which the profession should ask itself, is — "How have we met the new problems of private law which the greater power of business co-operation has presented to us?" I lay emphasis in putting this question on the problems of the private law, and the way our courts are meeting them, as I do not believe that what we may call the public common law is or can be developed without the aid of legislation, so as to protect the community against many possible forms of monopoly. No one, I think, can read the large number of decisions dealing with recent trade controversies between the employer and employed, or between rival capitalists or rival workmen, without being convinced that on the whole our courts have dealt efficiently with most of the questions of private law presented to them; perhaps the most conspicuous example of this efficiency in the face of new conditions is the way in which we have applied the preventive writ of injunction to all forms of unlawful interference with a man's right to carry on his trade or business.

Recently, however, there has been a note of uncertainty in the way in which our courts have met certain new forms of trade oppression which we may call, for lack of a better name, the "refined boycott." The "boycott" first appeared as the companion

¹ Being an address delivered before the Private Law Section of the Congress of Arts and Sciences, St. Louis, September, 1904.

of the strike. The strikers, as in the leading case of *Casey v. Cincinnati Typographical Union*,¹ send notices to all those who trade with their former employer that if the recipients continue to trade with him, the writers and their associates will no longer deal with them. Injury to the employer resulting, our courts seem to have had little difficulty in declaring this form of economic pressure of the employer's customers for the purpose of compelling the employer to accede to the wishes of his former employees as a civil wrong to him.² What we may call the surrounding facts of most of the cases of this character does not tend to incline the court towards a lenient view of the defendants' conduct. But this crude form of "boycott" can never be more than a temporary expedient resorted to in the heat of a struggle, actually in progress between an employer and his men. The more refined "boycott" is the product of a more deliberate plan to control the conditions of a trade or business, and requires a much larger and better organized association for its effective prosecution. A good example will be found in the Rhode Island case of *Macaulay Brothers v. Tierney*.³ The plaintiffs were master plumbers; the defendants, the officers and members of an association of master plumbers. The plaintiffs were not members of the association. The association resolved that they would not buy from any manufacturer of plumbers' supplies who sold to any master plumber not a member of the association. The object of the association was to control the conditions under which the business of master plumbers is carried on, and to that end eliminate the competition of those who were not members, — in other words, to create a "closed market." Manufacturers of plumbers' supplies who had previously sold goods to the plaintiffs, refused to continue to do so solely on account of warnings received from the officers of the association. The plaintiffs asked the court to restrain the officers of the association from sending notices to the manufacturers that they must not deal with the plaintiffs on pain of losing the custom of members of the association. The court refused any relief, not because of any special

¹ 45 Fed. Rep. 135, 1891.

² *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 1894; *Matthews v. Shankland*, 56 N. Y. Supp. 123, 1898; *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912 (C. C. A.), 1897; *Beck v. Railway Teamsters' Protective Union*, 42 L. R. A. 407 (Mich.), 1898; *Martin v. McFall*, 55 Atl. Rep. 465 (N. J. Eq.), 1903. Compare in accord: *Moores v. The Bricklayers' Union*, 23 Ohio Weekly Bul. 48, 1890; *Temperton v. Russell*, [1893] 1 Q. B. 715; *Quinn v. Leathem*, [1901] A. C. 485.

³ 19 R. I. 255, 1895.

objection to the form of relief asked, but on the broad ground that the members of the association, in carrying out their resolution, were acting within their legal rights.¹

The other examples of this character of "boycott" which have come before our courts are due to similar attempts of trade unions to confine those who work at a trade to the members of a particular union; in short, to unionize a shop. A union resolves that none of its members shall work with the members of a rival union or with non-union men. They notify their employers of their resolution. The purpose of the union is of course to have none but members of the association engaged in the trade, so that the association may control for the benefit of its members the conditions of employment. The employer has his choice of discharging his workmen not members of the particular union, or seeing all his employees, members of that union, strike. As such resolutions are not passed by unions unless they are likely to be effective, the employer often feels obliged to discharge the non-union men. These sue the members of the union causing their discharge, or ask for equitable relief, and the question of the legality of the union's acts is thus brought before the court. I have given the essential facts of the recent cases of *Plant v. Woods*, a Massa-

¹ The decision in this case largely rests on two cases, *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. 598; [1892] A. C. 25, and *Bohn M'fg Co. v. Hollis*, 54 Minn. 223, 1893. Neither of these cases, irrespective of the soundness of the decisions, involved the question of the legality of the use of economic pressure on third persons with the intent to prevent such persons dealing with the plaintiff. In *Bowen v. Matheson*, 96 Mass. 499, 1867, a demurrer to a declaration charging in effect that the defendants, who were traders, had maliciously conspired to boycott the plaintiff, another trader, by refusing to deal with anyone who dealt with the plaintiff, was sustained. In accord: *Payne v. The Western & Atl. R. R. Co.*, 13 Lea (Tenn.) 507, 1884. Compare *Heywood v. Tillson*, 75 Me. 255, 1883. In the following cases demurrers to similar declarations have been overruled: *Delz v. Winfree*, 80 Tex. 400, 1891; *Oline v. Van Patten*, 7 Tex. Civ. App. 630, 1894; *Graham v. St. Charles St. R. R. Co.*, 47 La. An. 214, 1895; *Webb v. Drake*, 52 La. An. 290, 1900; *Ertz v. Produce Exchange*, 79 Minn. 140, 1900; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 1902 (first count). Compare *International & Great Northern R. R. v. Greenwood*, 2 Tex. Civ. App. 76, 1893. In the following cases where the facts as found showed that the purpose of the defendants was, as in *Macauley v. Tierney*, to advance their own interests at the expense of the plaintiff, the court thought the plaintiff had not a cause of action: *Scottish Co-operative Soc. v. Glasgow Fleschers Union*, 35 Sc. L. R. 545, 1898; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 1902 (second count). An opposite conclusion was reached in the following cases: *Jackson v. Stanfield*, 137 Ind. 592, 1893; *Boutwell v. Marr*, 71 Vt. 1, 1899. In *Walsh v. Association of Plumbers*, 71 S. W. Rep. 455 (Mo. App.), 1902, the court overruled a demurrer to a bill identical with the bill filed in *Macauley v. Tierney*. *Quære*, whether the Missouri case was decided under a statute?

chusetts case,¹ *National Protective Association v. Cumming*, a New York case,² and *Erdman v. Mitchell*, a Pennsylvania case.³ In the first and last cases the court thought that the defendants' acts amounted to a civil wrong to the plaintiffs; in the New York case an opposite conclusion was reached in an opinion written by Chief Justice Parker. In this last case, three judges dissented. These cases serve to prove the assertion just made, that our courts have met the question of private law raised by the latest form of "boycott" in an uncertain manner. When the legality of attempts to close a market by economic pressure on those who deal with rivals has been called in question, as will be perceived by referring to the cases cited in the notes, the tendency has been to regard the acts of the defendants as lawful; when the legality of similar attempts to unionize a shop has been called in question, the tendency has been to regard such attempts as illegal. In both classes of cases, however, we have conflicting decisions.

Every new legal problem of any real difficulty requires for its solution an examination of the fundamental principles underlying the class of legal questions to which the new problem belongs, and an examination of the point of view from which our law approaches such problems. Thus, when we observe a conflict in the decisions on some new legal question, it is usually because of difference of opinion, not merely in the application of well-established rules, but in regard to fundamental principles and methods of examination.

¹ 176 Mass. 492, 1900. The earliest case involving the question is *Lucke v. The Clothing Cutters' Ass'n*, 77 Md. 396, 1893. The decision in *Plant v. Woods* is in accord with the decision in this case.

² 170 N. Y. 315, 1902. Compare, in apparent accord with the opinion of the dissenting judges, *Curran v. Galen*, 152 N. Y. 33, 1897 (C employed A. B *et al.* made a contract with C, by which C agreed to employ only union men. A would not join the union. C notified B *et al.* to discharge A. The notice was effective. A sued B *et al.* and recovered). The celebrated case of *Allen v. Flood*, [1895] 2 Q. B. 21, *sub nom.* *Flood v. Jackson*, [1898] A. C. 1, is not, at least as explained by the House of Lords in *Quinn v. Leathem*, [1901] A. C. 495, in accord with *National Protective Ass'n v. Cumming*. All that *Allen v. Flood* can now be said to decide, in view of the remarks of the judges in *Quinn v. Leathem*, is, that one who states to an employer the fact that he will have a strike unless he discharges a certain employee, is not liable to the employee, who is discharged in consequence of the threatened strike. The following lower court cases in New York are in accord with *National Ass'n v. Cumming*: *Davis v. United Portable Hoisting Engineers*, 28 N. Y. App. Div. 396, *dicta* Patterson, J., p. 398; *Masons and Plasterers v. Laborers' Union Pro. Soc.*, 60 N. Y. Supp. 388, 1899; *Reform Club of Masons v. Knights of Labor*, 60 N. Y. Supp. 388, 1899; *Tallman v. Gaillard*, 57 N. Y. Supp. 419, 1899. See also an earlier Indiana case, *Clemmitt v. Watson*, 14 Ind. App. 38, 1895.

³ 207 Pa. St. 79, 1903.

The legal question presented by the attempts to unionize a trade or close a market to free competition by economic pressure on the employers or customers of rivals is no exception to this rule. The published opinions in the cases referred to show more than a difference in the application of recognized legal principles; they show two radically different methods of ascertaining whether a defendant has or has not committed a tort. Most of those who reach the conclusion that the "refined boycott" is legal, have done so because they have fixed their attention primarily on the right of the defendant, rather than on the injury to the plaintiff.¹ On the other hand, those who have come to an opposite conclusion, have done so because they have primarily regarded the injury which the defendants have inflicted on the plaintiffs.² Indeed, granted the existence of these two methods of approaching the question of defendants' liability, in the above cases a conflict of opinion in regard to the legality of the defendants' acts is almost inevitable. One who regards primarily the rights of the defendants is almost sure to start with the assumption that a person not under contract with another may sell or refuse to sell to him, may work or not work for him, as he pleases. After this the argument generally runs somewhat as follows: "If *A et al.* threaten B that they, *A et al.* will not work for B if B deals with C; since *A et al.* are not under any obligation to deal with B, and B is under no obligation to deal with C, *A et al.* have not threatened to do what they had no legal right to do, and they have not asked B to do what he had no right to do, and therefore C is not wrongfully injured."³ Granted that the method of examination and the first assumption are correct, there is nothing wrong in the deduction, and the conclusion must be correct. On the other hand, those who primarily direct their attention to the injury inflicted on the plaintiff do so because they assume that if the defendants have injured the plaintiff, they are liable for the injury, unless they can show a

¹ See the first part of Judge Parker's opinion in *National Protective Assn. v. Cumming*, 170 N. Y. pp. 320-322; also, opinion of Mitchell, J., in *Bohn M'fg Co. v. Hollis*, 54 Minn. p. 232; opinion of Chapman, J., in *Bowen v. Matheson*, 96 Mass. p. 502; of Ingersoll, Sp. J., in *Payne v. Railroad Co.*, 13 Lea (Tenn.) pp. 517-520; opinion of Dean, J., in *Erdman v. Mitchell*, 159 Pa. St. p. 428.

² See opinion of Williams, J., in *International and Great Northern Ry. Co. v. Greenwood*, 2 Tex., Civ. App. p. 81; of Hammond, J., in *Plant v. Woods*, 176 Mass. pp. 496, 497; of Dean, J., in *Erdman v. Mitchell*, 207 Pa. St. pp. 89, 90.

³ Compare language of Lord James of Hereford, in *Allen v. Flood*, [1898] A. C. p. 180.

legal excuse. That the plaintiffs were injured by the defendants in all the cases mentioned is unquestioned. That the defendants had no legal excuse for that injury is self-evident, if we examine for a moment the necessary character of such an excuse. It should not be found in the interest or advancement of the defendant, or even in the advancement of third persons in whom the defendant may take a disinterested interest. The excuse should be found, if at all, in the interest of the community at large. For instance, underselling a rival trader may injure him, but the interest of the community in cheap goods is a valid excuse.¹ But in such cases as *Macauley v. Tierney*, or *National Protective Association v. Cumming*, the "refined boycott" had the monopoly in one case of a business, and in the other case of a trade, for its object; and monopoly, or the control of one man or combination of men of economic conditions in any field of industry, has always been and is still regarded by English-speaking communities as inimical to public welfare.²

It is submitted that the method of approaching a question of alleged tort which in these instances leads to regarding the "refined boycott" as legal is fundamentally wrong, and if it should gain any permanent foothold in our law, it would destroy any ability on the part of our courts to meet efficiently the new problems which the rapidly changing industrial conditions are crowding upon us. The attitude of mind which asks, when a plaintiff complains of injury, "Had the defendant a right to do the act which

¹ The interest of the community in the protection of the poorer classes may justify an employer refusing to continue to employ any one who deals with one who charges extortionate prices. *Heywood v. Tillson*, 75 Me. 225, 1883. It would appear that the community's interest in the promotion of sobriety would justify an employer refusing to employ anyone who dealt at a particular saloon situated near his works, and that on this ground, if not on that expressed by the court, the decision in *Payne v. Railroad Co.*, 13 Lea (Tenn.) 507, 1884, n. 1, p. 448 *supra*, can be justified. Some of the facts in *National Protective Assn. v. Cumming*, 170 N. Y. 315, 323, 1902, may indicate that the plaintiffs being unskilled in their trade, the defendants, their co-employees, were justified in securing their discharge, because the public has an interest in improving the skill of a class of artisans.

² In *Macauley v. Tierney* the court held that the desire of the defendants to free themselves from competition was a legal excuse for the injury which they inflicted on the plaintiff, thus substituting the alleged wrongdoer's own interest for the public interest as the basis of legal excuse for an injury. See 19 R. I. 258. In *Plant v. Woods*, 176 Mass. p. 505, Holmes, C. J., dissented because he thought the desire of the defendants to strengthen their organization, so that they could make a "better fight" in the future on the question of wages, a justification for the injury inflicted on the plaintiffs.

caused the injury?" must be consciously or unconsciously based on the assumption that there are some acts which man has an inherent right to do, irrespective of the circumstances under which he does them. Once admit this proposition, and someone will sooner or later perform the act which it is declared he has a legal right to do under all circumstances, under circumstances in which harm to others results, without any corresponding benefit to the community. The act of selling one's labor or one's goods is an act which in the past has usually gone unquestioned, because it was never performed under circumstances which shocked the moral sense of the community. The idea that there is an inherent right to buy or sell, to work or not to work, as one pleases, was the natural result. But the act of selling one's labor or one's goods does not differ essentially from any other act. There is no less and no more inherent right to sell labor or goods than to chop a tree. The legality of the act of tree-chopping depends on the surrounding circumstances; so with the sale. The law of torts in the past has not sprung, and could not spring, from an examination of the rights of those who injured others.

The assumption of those judges who hold the defendants' acts in the cases referred to *prima facie* illegal, because those acts have injured the plaintiff, would appear to be necessary to any advancement of our law. A state cannot recognize the existence in the individual of an inherent right to injure his fellow-man. It is only in the general recognition by our courts, of the principle that a man is *prima facie* liable for any injury to others caused by him, that we can hope to continue to meet new forms of private injury as they arise. It is inevitable that from time to time acts which heretofore have been performed under circumstances which either did not injure others or for which the actors had a valid excuse, come to be performed under circumstances which either produce injury or deprive the usual excuse of its validity. When this occurs, courts are confronted with a new question in the law of torts. This is what is now occurring in the industrial world. In the past the act of buying and selling has either been without resulting injury to anyone, or if injury has resulted, as in the case where sharp competition has driven one of the competitors to the wall, the interest of the community in procuring cheaper goods has formed a sufficient legal excuse for the injury. To-day, however, owing to the greater power of combination, the act of granting or withholding one's goods or labor can be made under circumstances

which produce injury to others, and deprive the actors of any legal excuse for that injury. The worst modern examples of this are the attempts, of which the acts of the defendants in the cases discussed are instances, of associations of capitalists and of associations of laborers to close the market to outsiders or the shop to the non-union man or member of a rival union. In all of them the act of the defendants in granting or withholding their goods or labor was an act oppressive to those who would deal with the plaintiff. Its intent was to drive the plaintiff out of the trade or business which the defendants desired to monopolize for themselves. However words sounding of "inherent rights" may momentarily cloud the issue, in the long run I believe our courts will, without exception, declare this form of "boycott" illegal, and, as in Pennsylvania and Massachusetts, hold those who institute it liable for the injury they inflict upon others. To right the wrong inflicted on particular individuals, legislation is not needed. What is needed is to get rid of the notion that there are some acts, such as buying and selling, which a man has an inherent right to do under all circumstances, and hold to the fundamental position of our common law — that he who injures his fellow-man is liable for that injury, unless he can show that the community regards his act as conducive to the public welfare.

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LAW APPLICABLE TO LIABILITY OF STOCKHOLDERS FOR DEBTS OF CORPORATIONS. — It is well established that stockholders of a corporation doing business in states allowing limited liability cannot escape individual liability if it is imposed by the law of the state in which the corporation is chartered. This rule is frequently stated by text writers in terms sufficiently broad to cover the cases in which the circumstances as to the laws of the two states are reversed.¹ The Supreme Court of the United States has held that the stockholders of a corporation formed in a state in which limited liability is permitted, for the purpose of transacting business in a state in which stockholders are individually liable, will, in the absence of a provision in the charter for limited liability, be taken to have contracted with reference to the laws of the state in which their corporation intends to act.² On the other hand, it has recently been decided by the King's Bench Division that the stockholders of an English limited company are not liable for debts contracted by the company in California, although the laws of that state hold each stockholder of a corporation transacting business within its territory to an individual liability for its debts there contracted. *Ridson Iron and Locomotive Works v. Furness*, 21 T. L. R. 179. The articles of incorporation provided that the company should be empowered to appoint an agent to do all such acts as might be necessary to comply with the law of any country where the corporation might carry on business.

This conflict of opinion squarely raises the question as to the law governing the liability of stockholders in a corporation doing business in several

¹ Beale, *Foreign Corp.* § 442; *Thompson, Liability of Stockholders* § 80; *Wharton, Confli. of L.* § 105b.

² *Pinney v. Nelson*, 183 U. S. 144. .

states. A personal obligation, which is the result of some act of the person bound, is created by the law of the place where that act is done,³ whether it is done by the principal directly or through the medium of an agent. If, for example, a partnership is formed in one state and its agent contracts an obligation in another, the liability of the partners is governed by the law of the place in which the agent acts.⁴ The existence of the relation of principal and agent, however, is to be determined by the law of the place where the transaction occurred from which the agency is alleged to have arisen. Thus, in the case of an attempt to fasten liability upon a special partner as a result of the acts of an agent of the partnership, it has been held that the law of the place of the partnership agreement must determine whether the partnership agent is empowered to bind the special partner.⁵ It would seem to follow that the incidents of the relation of stockholder and corporation should be fixed by the law of the place where that relationship came into being, namely, the place where the corporation was created. Of course, it must be regarded as well settled that the agents of a corporation are not the agents of the stockholders.⁶ That the maximum liability of an owner of stock is settled at the time of incorporation is shown by several decisions in which statutes imposing upon stockholders individual liabilities not imposed by the laws of their charters have been held unconstitutional as impairing the obligations of contracts.⁷ Of course parties may in all cases introduce the provisions of a foreign law into their contract,⁸ but it is believed that the mere fact that a corporation is intended to transact business abroad should not be sufficient to impose the statutory liability prescribed by the laws of a foreign state upon stockholders who incorporated under laws providing for a limited liability.

THE EQUITY OF MARSHALING. — Where one creditor may resort to two securities for the payment of his debt while another has a subsequent claim upon only one of them, the former will be compelled in equity, in so far as he may not be prejudiced, first to exhaust that security which the latter cannot reach. Thus if A has mortgages of Whiteacre and of Blackacre, and B has a second mortgage upon Blackacre only, B may in foreclosure proceedings require A to resort first to Whiteacre.¹ And if A in fact proceeds first against Blackacre, B may reach Whiteacre by subrogation.² In the United States the majority of the courts say that B has a fixed equitable right in Whiteacre, which, like ordinary equities, persists until the *res* gets to a *bona fide* purchaser, so that B may still marshal A against Whiteacre after it has been mortgaged to C with notice of the other mortgages.³ The English courts deny that any equitable right arises until foreclosure proceedings are commenced. Accordingly, as between B and C, they pay A's mortgage ratably from Whiteacre and Blackacre.⁴

³ Beale, *Cas. Confl. of L.* 515.

⁴ *Baldwin v. Gray*, 4 Mart. N. S. (La.) 192.

⁵ *King v. Sarria*, 69 N. Y. 24.

⁶ *Morawetz, Priv. Corp.* § 565. See *Smith v. Hurd*, 12 Met. (Mass.) 371.

⁷ *Ireland v. Palestine, etc., Turnpike Co.*, 19 Oh. St. 369.

⁸ *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589, *per* Bowen, L. J.

¹ *Aldrich v. Cooper*, 8 Ves. 382, 394.

² *Gibson v. Seagrim*, 20 Beav. 614.

³ *Robeson's Appeal*, 117 Pa. St. 628.

⁴ *Barnes v. Racster*, 1 Y. & C. C. C. 401.

This conflict of authority appears to turn on the nature of marshaling. Marshaling is an equitable procedure to apply assets in accordance with the rights of the parties under the circumstances presented to the court, whether in the payment of creditors from a decedent's estate or in the satisfaction of claimants from overlapping securities. It is part of the broad question, what property can be reached to satisfy an obligation, and is therefore a matter of remedy, to be determined by the law of the forum at the time of the suit.⁵ This reasoning accords with the English view. In the one American case, however, which squarely raised the point in this form, a majority of the court held that it was a matter of right, to be governed by the law at the time of B's mortgage.⁶ Granting the correctness of the English theory, it does not follow, however, that the general result under the prevalent American view is wrong. The conflict should be regarded as a difference not of legal principle but of fact, namely, whether under the circumstances it is fairer that C should exonerate B or that they should contribute ratably, and on this courts may well differ. Where part of property subject to three mortgages was taken for a railroad and, pending the suit for compensation, which was to be subject to the mortgages, the third mortgagee was cut out of the remaining land by a foreclosure of the second mortgage, it was recently held, approving the English cases, that the first mortgage could not be marshaled against the land in the hands of the purchaser at the foreclosure sale, but should be paid ratably from the land and the compensation money. *Bates v. Boston Elev. R. Co.*, 72 N. E. Rep. 1017 (Mass.). These facts neatly avoid the general conflict so that no other decision would be justified. For, the moment the third mortgagee is in a position to seek marshaling against the land, the purchaser at foreclosure is on hand seeking similar relief against the compensation money. The situation would be the same if simultaneous mortgages were made of Blackacre and Whiteacre to B and C respectively. Neither deserves a preference.

SPECIFIC PERFORMANCE FOR INSOLVENCY. — Inadequacy of legal remedy is the basis of equity jurisdiction. The reason, therefore, that contracts regarding chattels are seldom enforced in equity is not that they constitute a subject-matter over which equity will not take jurisdiction, but that, generally, the legal remedy of damages is adequate. Accordingly, where a chattel has a unique value, equity will grant relief as readily as in case of land.¹ Likewise, upon the ground of inadequacy of redress at law, equitable interference may be demanded by the peculiar circumstances of a transaction.² When a vendee has paid the purchase price for specific goods, for instance, and the vendor has become insolvent, the great weight of authority grants the vendee specific performance, contrary to a recent decision in Florida.³ *Hendry v. Whidden*, 37 So. Rep. 571. Ordinarily, a sale of goods even with advance payment, raises no equity upon which specific performance can be predicated, for money damages afford ample remedy. But when the

⁵ Cf. *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365.

⁶ *Bank of Orangeburg v. Kohn*, 52 S. C. 120.

¹ See Ames, *Cas. Eq. Jur.* 40, n.

² *Parker v. Garrison*, 61 Ill. 250.

³ *Parker v. Garrison*, *supra*; *McNamara v. Home Land Co.*, 105 Fed. Rep. 202; *Draper v. Stone*, 71 Me. 178 (*semble*); *Clark v. Flint*, 22 Pick. (Mass.) 231. *Contra*, *McLaughlin v. Piatti*, 27 Cal. 451.

added factor of insolvency intervenes, the aid of equity is necessary to prevent the vendee from losing both the goods and his money. Equity, therefore, makes the vendor a constructive trustee of the chattels. It interferes in this case upon the same principle that it applies in granting an injunction, upon proof of the insolvency of the promisor, to prevent the breach of a contract not to compete, although liquidated damages were contemplated as the sole relief.⁴

The most plausible argument that has been urged against specific performance of a contract of sale during the defendant's insolvency is its violation of the spirit of our bankruptcy legislation, in that it creates a preference. This contention seems untenable. If the relief is denied, the general creditors gain the undue advantage of sharing in both the purchase price and the goods at the expense of the vendee. The situation is analogous to that in cases of stoppage *in transitu*, where the seller, after parting with title and expressly giving credit, is allowed to reclaim the goods on the broad equitable principle that "the goods of one man should not be applied in payment of another man's debts."⁵ The result in *Holroyd v. Marshall*⁶ would be equally obnoxious to such an interpretation of the policy against preferences. It is true that a mortgage of after-acquired property differs from a contract of sale, in that it operates as a contract to give a security. Because it is specifically enforceable regardless of insolvency, it creates an equity in the goods at the moment of acquisition. But it is equally true that this equitable remedy usually becomes important only where it works to the disadvantage of other creditors of the equitable mortgagor. This supposed objection is, moreover, applicable to cases where a consciously insolvent bank receives deposits. But equity holds that so long as the deposit is traceable in the increased assets of the bank, it is subject to a constructive trust.⁷ In short, equity interferes in cases of insolvency not to give the plaintiff a preference but to deny the general creditors an undeserved enrichment at his expense. And the bankruptcy courts have recognized the justice of this position.⁸ A similar result might be reached when there is only part payment of the purchase price with subsequent insolvency. The vendor should not be allowed to retain both the money and the goods. He should be made mortgagee of the goods, holding them as security for the unpaid purchase price, and, upon payment, the vendee should be entitled to specific performance.

INDIVIDUAL LIABILITY OF STOCKHOLDERS AS AFFECTED BY TRANSFER OF STOCK. — Until the beginning of the nineteenth century, the corporation was regarded as holding the corporate property in trust for the stockholders;¹ and they, as *cestuis que trustent*, were bound in equity to exonerate the corporation for any excess of corporate debts over corporate

⁴ See *Zimmerman v. Gerzog*, 13 N. Y. App. Div. 210.

⁵ *D'Aquila v. Lambert*, 1 Amb. 399. In England, at least, this right extends even to stoppage of the proceeds of the sale to a sub-vendee while the goods are in transit. *Ex parte Golding*, 13 Ch. D. 628. But see *Kemp v. Falk*, 7 App. Cas. 573, 577.

⁶ 10 H. L. Cas. 191.

⁷ See *Ames, Cas. Trusts*, 12, *n.*; *Williston, Cas. Bankruptcy*, 420, *n.* 1.

⁸ See *Scammon v. Bowen*, 1 Hask. (U. S. C. C.) 496; *Hamilton v. Nat'l Bank*, 3 Dill. (U. S. C. C.) 230.

¹ *Hildyard v. South Sea Co.*, 2 P. Wms. 76; *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Sandys v. Sibthorpe*, 2 Dick. 545. It was not until 1836, in *Bligh v. Brent*, 2 Y. & C. 268, that the modern view was adopted. See 2 HARV. L. REV. 151.

assets.² To-day, however, a stockholder is under no liability to creditors except by statute.³ Where such a statute does exist, he is treated as offering to indemnify to the statutory extent any person giving credit to the company; and when such credit is given, this offer ripens into a binding contract.⁴ Accordingly, a statute repealing a provision for the individual liability of stockholders is unconstitutional and void as to existing creditors.⁵ On the other hand, statutes imposing liability upon stockholders cannot be retroactive,⁶ and always provide that the stockholder may effect a novation of his liability by transferring his shares.⁷

This freedom from liability, however, does not follow a transfer of stock under all circumstances. Although the English courts have held that a shareholder is released from liability by an absolute conveyance of his stock, irrespective of the solvency of the corporation or transferee,⁸ they have been ready to find upon slight evidence that the transfer was not genuine.⁹ Furthermore, they have decided that where the directors may refuse to register a transfer, they must so refuse if the corporation and transferee are insolvent.¹⁰ Should they knowingly register such a transfer, they would be guilty of a tort toward the creditors, and the transferor would not be allowed to profit thereby.¹¹ And if the stockholder procured such registration by suppressing his knowledge of the transferee's irresponsibility, he would be guilty of fraud, and would, therefore, remain liable.¹² In this country the courts have not allowed the stockholder to escape liability by transferring his stock when such transfer is made with knowledge of the insolvency of the company and of the irresponsibility of the transferee.¹³ And the Circuit Court of Appeals of the Seventh Circuit has recently decided that a stockholder in an insolvent National Bank is discharged from liability if he has transferred his stock to a person able to perform the obligations thereby cast upon him. *McDonald v. Dewey*, 37 Chi. Leg. N. 174.¹⁴ Mr. Justice Grosscup dissented on the ground that one transferring his stock with knowledge of the company's insolvency should remain liable even though the transferee is solvent.

These cases present a conflict between the desire of the courts on the one hand, to protect the creditors and, on the other, to enable stock-

² *Salmon v. Hamburg*, Ch. Cas. 204; *Hume v. Windyaw*, 1 Car. L. J. 217.

³ *Pollard v. Bradley*, 87 U. S. 520; *Gray v. Coffin*, 9 Cush. (Mass.) 192.

⁴ *Carol v. Green*, 92 U. S. 509. But see *McClaire v. Rankin*, U. S. Sup. Ct., Mar. 6, 1905, where it was held that the individual liability of a stockholder in a national bank is statutory and not contractual for purposes of the statute of limitations.

⁵ *Hawthorne v. Calef*, 2 Wall. (U. S.) 10. Such a provision, however, may be repealed as to future debts. *Ochiltree v. Railroad Co.*, 21 Wall. (U. S.) 249.

⁶ *Fairchild v. Masonic Hall*, 71 Mo. 526.

⁷ *Veiller v. Brown*, 18 Hun (N. Y.) 571; *Cleveland v. Burnham*, 55 Wis. 598.

⁸ *De Pass's Case*, 4 DeG. & J. 544; *Queen v. Lambourn Co.*, 22 Q. B. D. 463.

⁹ *Costello's Case*, 2 DeG. F. & J. 302; *Budd's Case*, 30 Beav. 143. Nor are the English courts consistent in their strict interpretation of this right to transfer, for when a transfer is made on trust for the transferor, the latter remains liable, even though the company's deed contained a clause that trusts should not be recognized. *Chinnock's Case*, John. 714. Again, one transferring to an infant or to a married woman remains liable. *Mann's Case*, L. R. 3 Ch. 459, *n*.

¹⁰ See *Payne's Case*, L. R. 9 Eq. 223; *Williams' Case*, L. R. 9 Eq. 225, *n*.

¹¹ *Eyre's Case*, 31 Beav. 177; *Bennett's Case*, 5 DeG. M. & G. 284.

¹² See *Ex parte Parker*, L. R. 2 Ch. 685.

¹³ *Bowden v. Johnson*, 107 U. S. 251; *Stuart v. Hayden*, 169 U. S. 1; *Earle v. Carson*, 188 U. S. 42.

¹⁴ *Miller v. Gt. Republic Ins. Co.*, 50 Mo. 55.

holders to deal freely with their stock. Since the statutory provisions for the transferability of stock are general, this limitation is an act of judicial legislation, and the creditors should get no greater relief than justice requires. That the transferee may become insolvent is true, but the same risk exists when the company is solvent. Moreover there is the equal danger of the transferrer becoming insolvent. The decision of the majority in the principal case seems to preserve the rights of all concerned since it carries out the mercantile idea of making stock freely transferable and at the same time adequately protects creditors in their right of recourse against stockholders.

RIGHTS AND LIABILITIES UNDER OPTION CONTRACTS. — Options have been universally construed by the courts as binding agreements to keep an offer open. On this analysis, the acceptance of the option constitutes the consummation of a bilateral contract, and binds both parties. *Dicta* innumerable to this effect may be found in the cases,¹ both in actions by the holder and in actions by the giver of the option. Thus, in an Alabama case,² where the holder of the option attempted to withdraw after acceptance, the giver of the option was refused specific performance only because he was unable to make a good title. It has been insisted, however, that an option is not a contract to keep an offer open,³ but a complete unilateral contract in which the obligation of the giver of the option is subject to the condition precedent of tender of payment by the holder. Under this view, of course, the latter does not become bound on notification of acceptance. The choice between the two views would seem to depend simply on the intention of the parties. This may clearly appear in the agreement; when, however, as is usually the case, it does not, the general understanding of business men should govern, which would probably favor the interpretation of the courts. Contracts for the sale of land, the usual subject of options, are generally bilateral; and it is, therefore, not unnatural to suppose that the transaction to which the option contract looks forward should be such a contract.

On either theory, however, an option is a contract, and should carry the usual rights and duties of a contract. Accordingly, it is well settled that an option to buy land will be specifically enforced. The defense of lack of mutuality which has been time and again interposed is obviously fallacious. If the option is an offer, both parties become bound by the acceptance, and the situation differs in no respect from that in an ordinary contract of sale.⁴ If it is not an offer, the giver of the option can, nevertheless, no more plead lack of mutuality than the promisor in any other unilateral contract whose obligation is subject to a condition precedent. Similarly, the great weight of authority makes an option assignable. True, the option frequently runs to the assigns, but the courts do not rely on this circumstance,⁵ and will enforce the option though assigns are not mentioned.⁶ It is, therefore, somewhat surprising to find the West Virginia Supreme Court refusing specific performance at the suit of an assignee of an option to purchase land. *Rease v. Kittle*, 49 S. E. Rep. 150. The court argues that, since an option

¹ See *Perry v. Paschal*, 103 Ga. 134.

² *Linn v. McLean*, 80 Ala. 360.

³ Professor Langdell, in 18 HARV. L. REV. 1, 11.

⁴ See *Perry v. Paschal*, *supra*.

⁵ See *Maughlin v. Perry*, 35 Md. 352.

⁶ See *Linn v. McLean*, *supra*.

is an offer, it is no more assignable than an ordinary revocable offer. This reasoning overlooks the fact that the giver of the option, unlike the other offeror, has already bound himself to sell the land; and this contract of sale into which, at the will of the holder of the option, the option will ripen, will be freely assignable. As the decision in the principal case, therefore, in no wise protects the giver of the option, it appears simply to place a useless clog on the freedom of business transactions. The reasoning of the case seems, indeed, to furnish an example of one of those super-refinements of legal logic which courts generally recognize merely to dismiss. The case finds some support in the analogy of the Rhode Island doctrine that the right of the holder of an option is not descendible,⁷ a rule, however, only less exceptional than that in the principal case.⁸

NATURE OF A LANDOWNER'S RIGHT TO KILL GAME. — In the Roman law the ownership of animals *ferae naturae*, even when upon private land, was in the inhabitants of the state in common; in the English law it was in the sovereign as representative of the people.¹ Although a landowner acquired property in animals killed upon his land, the state, by virtue of its ownership of the animals when alive, controlled the privilege of killing them.² It has, therefore, been suggested that a landowner's right to shoot game upon his own land is not an interest in property, but merely a license granted at the discretion of the state and revocable at any time. As the inhabitants of the state are owners in common of the wild animals, non-residents may be excluded from the privilege of shooting them for the reason that they have no title.³ A recent Arkansas case refused to adopt this theory. A statute forbade non-residents to shoot and fish in the state. The defendant, a non-resident, who owned land in the state, pleaded that the statute violated the Fourteenth Amendment in that, by depriving him of a property right which other proprietors enjoyed, it failed to afford him the equal protection of the law. The court sustained his contention. *State v. Mallory*, 83 S. W. Rep. 955.

There seems to be no reason in the nature of things why the state originally, as owner of both land and wild animals, should not have granted the land and withheld the right to shoot the animals. But the weight of authority is clear that the state made no such reservation. In England a man has a common law right to shoot game on his land, and this he possesses *ratione soli*.⁴ It is recognized as a property right which may be granted to others, who thereby acquire a *profit à prendre*, a distinct interest in the land.⁵ Similarly, the Supreme Court of Canada has held that the right of a riparian landowner to fish on non-navigable waters is an exclusive right attached to his interest in the land, and that an attempt of the state to grant a license to one landowner and not to another was an arbitrary interference with property

⁷ *Newton v. Newton*, 11 R. I. 390.

⁸ See *McCormick v. Stephany*, 57 N. J. Eq. 257.

¹ Inst. Just. bk. 2, pt. 1, § 12; 2 Bl. Com. 414.

² 2 Bl. Com. 410.

³ See *Geer v. Connecticut*, 161 U. S. 519; *Magner v. People*, 97 Ill. 320.

⁴ Coke, 4 Inst. 304; *Kebble v. Hickringill*, 11 Mod. Rep. 75. See *Blades v. Higgs*, 11 H. L. Cas. 621, 630.

⁵ *Webber v. Lee*, 9 Q. B. D. 315.

rights.⁶ Some jurisdictions in the United States have decisions to the same effect.⁷

It is true that although the landowner has a property right, the state may absolutely suspend it by the exercise of its police power in order to preserve a necessary food supply. Under such circumstances, however, the inherent right would still exist and would revive the moment the restriction were removed, and the law would bear equally upon all. But if the landowner has only a revocable license, the state could withdraw the privilege arbitrarily from all or any, and could grant it again to a few, with or without charge. Public policy alone should forbid the adoption of a rule making possible so rude a departure from established practice.

CHARACTER OF THIRD PERSONS AS EVIDENCE OF THEIR ACTS. — Whatever may be the probative value of character evidence in general, it is usually inadmissible where offered merely to prove or disprove an act.¹ This rule, however, is not without exceptions. Thus, the accused in criminal trials is permitted to offer evidence of his good character, although the prosecution may attack his character only in rebuttal. And in certain cases where the act of a person not a party to the suit becomes material, established usage sanctions the admission of character evidence. In statutory prosecution for adultery, for instance, evidence of the moral character of the person with whom the defendant is alleged to have committed the act, is held admissible.² And when bastardy is in issue, the character of the mother may be shown.³ Similarly, evidence of the character of animals is held competent as bearing on the commission by them of alleged vicious acts.⁴ In homicide cases, where the plea is self-defense, it has been said that evidence of the character of the deceased is admissible to support testimony that he actually attacked the defendant.⁵ There are many *dicta* and a few decisions to this effect. The majority of courts, however, still emphasize the necessity of proving the defendant's knowledge of the character of the deceased, which would indicate that such evidence is admissible only to show reasonable apprehension on the part of the accused.⁶

A late Texas case is typical of the tendency of some courts to extend the scope of these exceptions. The defendant, for the purpose of reducing a homicide to murder in the second degree, testified that he had found the deceased in adultery with his wife, the daughter of the deceased. The court admitted evidence of the vicious character of the deceased as tending to show the offense charged against him. *Orange v. State*, 83 S. W.

⁶ *Venning v. Steadman*, 9 Can. Supreme Ct. R. 206.

⁷ *Payne v. Sheets*, 55 Atl. Rep. 656 (Vt.).

¹ Thayer, Prel. Treat. Ev. 525.

² *Blackman v. State*, 36 Ala. 295; *Commonwealth v. Gray*, 129 Mass. 474. But see *Guinn v. State*, 65 S. W. Rep. 376 (Tex.).

³ *Pendrell v. Pendrell*, 2 Stra. 924; *Fall v. Overseers, etc.*, Augusta Co., 3 Munf. (Va.) 495.

⁴ *Broderick v. Higginson*, 169 Mass. 482. Compare also with the foregoing exceptions, *Rowt's Adm'r v. Kile's Adm'r*, Gilmer (Va.) 202; *Marble v. Marble*, 36 Mich. 386.

⁵ *Wigmore, Gr. Ev.* 38; 1 *Wigmore, Ev.* 63, and cases cited. Cf. *Chase v. State*, 46 Miss. 683.

⁶ *De Arman v. State*, 71 Ala. 351; *State v. Hensley*, 94 N. C. 1021; *People v. Rodawald*, 177 N. Y. 408.

Rep. 385. If such free use of character evidence is well founded, the transition is easy to a general exception allowing evidence of the character of third persons whenever it is material.⁷ If, on the other hand, the general rule is grounded in experience and justice, its application ought not to be further limited. While good character has a material, though uncertain, value in disproving a depraved act, bad character is of less weight in proving the commission of a particular act. The fact that a man is capable of a certain crime tends only remotely to show that he was actually committing it at a particular time. Moreover, character evidence is likely to be colored by individual prejudice, and it is also of so vague a nature and so difficult to test by cross-examination, that it may go to the jury unshaken, though manufactured to suit the needs of the case. Obviously, too, although the degradation of the person injured has no bearing upon the degree of the defendant's crime, it is hardly possible that the jury's estimate of his guilt will not be influenced by it. Because of the inherent weakness of character evidence, and the unwarranted effect it is likely to have on the jury, it would appear to be the safer course to adhere to the general rule, save in the cases where precedent has established exceptions.

PAYMENT INTO COURT AS AN ADMISSION OF LIABILITY. — When payment into court by a defendant was first allowed, the money was brought in under a rule of court, that, unless the plaintiff accepted it in discharge of his claim, the amount should be struck from the declaration.¹ By the General Rules of Trinity Term, 1 Vict.,² however, it was provided that such payment should in all cases be pleaded. It had already been decided that a tender could not be pleaded concurrently with a denial of liability on the same cause of action,³ although the pleading of inconsistent defenses was permissible at the discretion of the court.⁴ On the same principle, it was now held that payment into court could not be pleaded in conjunction with a denial of the cause of action thereby admitted.⁵ This remained the rule, until a decision under the Judicature Acts of 1873 and 1875⁶ effected the radical change of allowing the plea of payment into court concurrently with any defense denying the cause of action. The decision might at first appear a necessary consequence of the new statutes stripping the court of its discretionary powers in permitting inconsistent defenses; but this view disregards the fundamental question, whether a proceeding which amounts to conclusive admission of the right of action can properly be termed a defense at all, though, by a technical rule of procedure, it appears on the record as a plea. On this latter reasoning the court in an early Massachusetts case⁷ summarily disposed of the contention that to refuse a defendant who had paid money into court the right to deny the cause of action would be to violate the statute allowing inconsistent defenses. The case is in accord

⁷ 1 Wigmore, Ev. 68.

¹ See 1 Tidd's Pr., 6th ed., 650. The New Jersey practice would appear to be the same. See *Levan v. Sternfeld*, 55 N. J. Law 41.

² See 3 Chitty, Pr. 577.

³ *Macjellan v. Howard*, 4 T. R. 194; *Jenkins v. Edwards*, 5 T. R. 97.

⁴ St. 4 Anne, c. xvi. § 4.

⁵ *Thompson v. Jackson*, 1 Man. & G. 242.

⁶ *Berdan v. Greenwood*, 3 Ex D. 251. Followed, and the rule extended to the plea of truth in an action for libel in *Hawkesley v. Bradshaw*, 5 Q. B. D. 302.

⁷ *Bacon v. Charlton*, 61 Mass. 581.

with the universal American rule,⁸ and, if the premise on which it proceeds is admitted, it is unimpeachable.

Obviously, then, the English rule can be upheld only by regarding payment into court as not necessarily an admission of the cause of action. But, then, what is it? It cannot be construed as an offer of compromise, made, through the court, at the last moment; for, on payment into court, the money becomes the property of the plaintiff whatever the outcome of the action. Perhaps it may best be interpreted as a sort of premium paid by the defendant to secure himself against payment of costs in case he is correct in his judgment that the plaintiff has no right of action for an amount beyond that tendered. Provided such is actually his intention, it seems reasonable enough to allow him this privilege, since the plaintiff can in no wise be prejudiced thereby.⁹

In a recent case of first impression on the point, the St. Louis Court of Appeals has followed the American rule. *Wells v. Missouri Edison Co.*, 84 S. W. Rep. 204. The case, however was a tort action, in which payment into court is not a common law right, having been first given by statute.¹⁰ Since no such statute exists in Missouri, it had previously been held that in such an action payment into court will not avail the defendant to escape the payment of costs, though the recovery is for a smaller amount than that brought in.¹¹ But if payment into court by the defendant in tort actions is void, it should be nugatory as well in respect of benefits to be derived therefrom by the plaintiff as by the defendant. The principal case, therefore, can be supported only if it overrules the earlier case.

EFFECT OF ULTRA VIRES TRANSACTIONS.—When the sovereign gave definite effect to the idea that the act of a community of men should be distinguished from their several acts by erecting the community into an artificial legal person,¹ the courts naturally had to pass upon the rights and liabilities of this new being. In its nature they found its limitations. Being invisible, it could appear only by attorney;² and being intangible, it could not suffer or commit personal injuries.³ Having no soul,⁴ it could not commit a crime⁵ or take an oath.⁶ All these limitations were inherent in its nature, and not due to any legal prohibition. Even in requiring a seal, the courts merely followed the custom of cor-

⁸ See 1 Greenleaf, Ev., 16th ed., § 205.

⁹ See the opinions of Thesiger, L. J., in *Berdan v. Greenwood*, *supra*, and of Lord Bramwell, L. J., in *Hawkesley v. Bradshaw*, *supra*. On this point, too, later English legislation is suggestive. By Rules of the Supreme Court, 1883, Order XXII. rule 6, it is provided that, when payment into court is accompanied by an express denial of the right of action, and when the plaintiff persists in his suit, and recovers less than the amount tendered, the difference shall be returned to the defendant. It would seem, also, that, when the payment is unaccompanied by such denial, the old practice has been restored, and the defendant cannot show that no cause of action exists. See *Dumbleton v. Williams*, 102 L. T. 384.

¹⁰ St. 3 & 4 Will. IV. c. 42, § 21.

¹¹ *Joyner v. Bentley*, 21 Mo. App. 26.

¹ 1 Poll. & Mait. Hist. Eng. Law, 2d ed., 502, 669 *et seq.*

² Brooke Abr. tit. Corp. 63.

³ Brooke Abr. tit. Corp. 63. This has been doubted. See Grant, Corp. 278.

⁴ *Tipling v. Pexall*, 2 Hulst. 233.

⁵ See Case of Sutton's Hospital, 10 Co. 22 b, 32 b.

⁶ *Wych v. Meal*, 3 P. Wms. 310.

porate action.⁷ In fact, the Statutes of Mortmain were the first to deprive corporations of privileges which both they and individuals were capable of exercising. But these statutes did not change their nature.

When, however, the question of the effect of *ultra vires* transactions first came before courts of the nineteenth century, the principles of agency were sufficient to overcome the difficulties which beset the ancient lawyers on account of their pseudo-anthropomorphic conception. Nevertheless, many courts seem to have confounded the older idea of inherent limitations with an idea of disability arising from lack of authorization by charter.⁸ As a result, the law is in confusion. Many cases go to the extent of saying that an *ultra vires* transaction, whether executed or executory, is absolutely void. *Shaw v. National, etc., Bank*, 132 Fed. Rep. 658; *Anglo-American, etc., Co. v. Lombard*, 132 Fed. Rep. 721. Most of the authorities, however, agree in refusing to enforce a wholly executory *ultra vires* contract,⁹ and also in refusing to overthrow the transaction if completely executed on both sides.¹⁰ If one party has fully performed, and thereby conferred a benefit upon the other, the courts are almost evenly divided as to holding the party benefited to his bargain.¹¹ And where the act done is within the apparent power of a corporation, so that only its officers have means of knowing whether the contract is *ultra* or *intra vires*, some courts enforce it.¹² Moreover, in many of these cases, the *ultra vires* transaction is held so far effective as to give one of the parties quasi-contractual rights.¹³

Upon principle, as well as historically, the theory that a transaction is absolutely void simply because it is *ultra vires* is without foundation. Under this theory no corporation could commit a tort or a crime or do anything to justify *quo warranto* proceedings on the part of the State. The argument that in such cases a corporation is acting not in excess but in abuse of its powers is untenable, for abuses, as well as excesses, are strictly beyond the powers granted in the charter. The true doctrine would seem to be that a corporation has the power to do anything, while its charter defines the limits of its authority. Lack of authorization is not equivalent to absolute statutory prohibition;¹⁴ but the stockholders and creditors have the right to rely upon the terms of the charter, and, therefore, to object to *ultra vires* transactions.¹⁵ Upon this ground it has been ably argued that, in the absence of objection by creditors or stockholders, all *ultra vires* transactions should be enforced.¹⁶ This contention, however, disregards the interest of the public in controlling and limiting corporate action within the bounds imposed by charter. It is this public policy which

⁷ 1 Poll. & Mait. Hist. Eng. Law, 2d ed., 683.

⁸ *Thomas v. Railroad Co.*, 101 U. S. 71, 82 *et seq.*; *Davis v. Old Colony R. Co.*, 131 Mass. 258. See *South, etc., Ry. v. Great Northern Ry.*, 9 Exch. Rep. 55, 84.

⁹ *Nassau Bank v. Jones*, 95 N. Y. 115.

¹⁰ *Long v. Georgia Pacific Ry. Co.*, 91 Ala. 519.

¹¹ *Bissell v. Mich. Southern, etc., Ry. Cos.*, 22 N. Y. 258, *per* Comstock, C. J.; *National Bldg., etc., Ass'n v. Home Savings Bank*, 181 Ill. 35.

¹² *Monument Nat'l Bank v. Globe Works*, 101 Mass. 57.

¹³ *McCormick v. Market Bank*, 165 U. S. 538.

¹⁴ Sometimes statutes forbid a corporation to do *ultra vires* acts. In such a case the court must decide what the statute means, and apply the law in regard to any illegal contract. See 20 N. J. Eq. 542, 562, 564. Similarly in deciding the effect of the Mortmain Acts, the courts decided that the transaction was void as to superstitious corporations, but voidable as to other corporations. It is important to distinguish such cases from simple *ultra vires* acts.

¹⁵ *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1.

¹⁶ Professor George Wharton Pepper in 9 HARV. L. REV. 255.

seems to explain the refusal of the courts to enforce such contracts when purely executory. Though the corporation has acted, the courts refuse to give effect to those acts. But when the contract is fully performed in good faith on one side, the public policy against its enforcement is overbalanced by the hardship which such refusal would cause. The disability, being imposed for reasons of public good, should be removed by the same considerations.

EXERCISE OF GENERAL CORPORATE POWER FOR PARTICULAR ULTRA VIRES PURPOSE. — Although the proposition that anyone dealing with a corporation must at his peril take notice of its charter or articles of association, and cannot recover on a contract in the making of which its corporate powers have been exceeded, is accorded general recognition as an established rule of law,¹ nevertheless there exists on the part of the courts a decided tendency to seize upon any exceptional circumstances as a basis for enforcing these *ultra vires* contracts. Accordingly, the rule is qualified in cases where a corporation has a certain general power and the circumstances are such that whether the particular exercise of this power is *ultra vires* depends on facts peculiarly within the knowledge of the officers of the corporation. The nature of this qualification is represented by the following classes of cases: (1) A corporation with power to issue negotiable paper in the course of its business is liable on its accommodation note in the hands of an innocent holder for value.² (2) A corporation with power to incur indebtedness up to a certain fixed amount is liable to one who in good faith loans it money in excess of that amount.³ (3) By analogy, it has recently been held that where a corporation with power to borrow money for the purposes of its business exercises that power for another purpose, the loan is not thereby invalidated in the absence of knowledge by the lender of the improper purpose of the loan. *In re David Payne & Co., Limited*, [1904] 2 Ch. 608.

This leads to a consideration of the effect of knowledge, on the part of the contracting party, of the extraneous facts which render a contract *ultra vires*. It might be contended that actual notice is equivalent to notice presumed by the law in matters entirely outside the scope of the corporate business, and that, where the reason for the qualification does not exist, the rules applicable to *ultra vires* contracts in general should prevail. Such undoubtedly would be the result in the first two classes of cases. The third class, however, in spite of the importance attached by the court in the principal case to the absence of knowledge of the improper purpose of the loan, is to be distinguished on the ground that such contracts are not in fact *ultra vires*. When a corporation issues an accommodation note or borrows money in excess of a fixed limit, the transaction *per se* is *ultra vires*, and the contracting party is a participant in that *ultra vires* transaction; but when a corporation exercises its general borrowing power for an improper purpose, it is the improper application of the funds that is *ultra vires*, and in that part of the transaction the lender is not directly concerned. In contracts between individuals for the sale of goods, bare knowledge by a vendor that an unlawful use is to be made of the goods sold will not prevent recovery of

¹ Morawetz, *Private Corporations*, 2d ed., § 591.

² *Monument National Bank v. Globe Works*, 101 Mass. 57.

³ *Ossipee, etc., Manufacturing Co. v. Canney*, 54 N. H. 295.

the contract price,⁴ although anything amounting to participation in the unlawful act will bar that recovery.⁵ By analogy it is believed that, in the third class of cases, the lender should be allowed to recover regardless of notice. In further support of this contention it is to be noted that if the improper purpose of the officers of the corporation should be subsequently abandoned and the funds properly applied, mere knowledge on the part of the lender of the preliminary wrongful intent would surely not be sufficient ground for invalidating the contract. This distinction, therefore, seems one upon which courts may properly seize in permitting a lender with notice of the wrongful purpose of the loan to recover against the corporation.⁶

RECENT CASES.

ADMISSIONS — ADMISSIONS BY CONDUCT — PAYMENT INTO COURT. — In an action of tort for personal injuries, the defendant pleaded a general denial and paid money into court. *Held*, that the cause of action is conclusively admitted, leaving only the question of damages to be tried. *Wells v. Missouri Edison Co.*, 84 S. W. Rep. 204 (Mo., St. Louis Ct. App.). See NOTES, p. 460.

BANKRUPTCY — PROVABLE CLAIMS — PART PAYMENT FOR BREACH OF TRUST BY CO-TRUSTEE. — By a compromise effected with one of two co-trustees who were jointly and severally liable for a breach of trust, the *cestui que trust* received a part of the sum found to be due. The other co-trustee was insolvent. *Held*, that the *cestui* may prove against the insolvent estate the full amount of the damages sustained by the breach of trust without deducting the sum already received. *Edwards v. Hood-Barrs*, 21 T. L. R. 89 (Eng., Ch. D.).

As the party injured may bring separate actions against each of several joint tortfeasors, so may a *cestui que trust* prove his claim for a breach of trust against the insolvent estate of each of his co-trustees. *Ex parte Poulson*, DeG. 79. But a claim against any one of several joint tortfeasors is satisfied in England by a judgment against any of the others, and in the United States by a satisfaction of such judgment. *Brinsmead v. Harrison*, L. R. 7 C. P. 547; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1. It follows that where a compromise secures part satisfaction from one of those liable, the claim against the other parties should be correspondingly reduced. *Ellis v. Esson*, 50 Wis. 138. Where the other parties are insolvent the rule should apparently hold as to claims against their estates. *Cf. In re Pulsifer*, 14 Fed. Rep. 247. The point is, however, said to be new in England, and does not seem to have been directly adjudicated in this country. Nor is assistance to be obtained from the cases where after part payment by a surety the creditor has still been permitted to prove for his whole debt; for the total amount provable remains in such cases unchanged, the only question being as to those entitled to prove it. See 16 HARV. L. REV. 139.

BILLS AND NOTES — CHECKS — EFFECT OF DUPLICATE CHECK. — The defendant, the payee of a check, indorsed it to the plaintiff, who lost it. Nearly seven months later the plaintiff obtained a duplicate from the drawer which the defendant indorsed but which the drawee refused to pay for lack of funds. *Held*, that the payee's indorsement of the duplicate is only an acknowledgment of his original liability from which the plaintiff's laches has already discharged him. *Lewis v. Commercial National Bank*, 83 S. W. Rep. 423 (Tex., Civ. App.).

The plaintiff's laches constituted a good defense to the liability of the defendant on the original check, since the loss of it did not dispense with a regular presentment for payment. *Thackray v. Blackett*, 3 Camp. N. P. 164. And the indorsement of the duplicate check by the payee charged him with no new liability to the plaintiff. See *Benton v.*

⁴ *Cheney v. Duke*, 10 Gill & J. (Md.) 11; *Hodgson v. Temple*, 5 Taunt. 181.

⁵ *Wheeler v. Russell*, 17 Mass. 258.

⁶ *Wright v. Hughes*, 119 Ind. 324; *Bradley v. Ballard*, 55 Ill. 413; *In re Contract Corporation*, L. R. 8 Eq. 14.

Martin, 40 N. Y. 345. But the defense of laches on the original obligation may be waived by an admission of liability or a promise to pay after notice of the facts constituting a release. *Thornton v. Wynn*, 25 U. S. 183. The indorsement of the duplicate, while creating no new liability, might, under some circumstances, be conclusive evidence of a waiver of the plaintiff's laches. See *Bank of Gilby v. Farnsworth*, 38 L. R. A. 843 (N. Dak.). But in this, as in most cases, the fairer inference seems to be that the indorsee was intended to be given only the rights which he might, at that time, have had on the original instrument.

BILLS OF LADING — ACCEPTANCE — FAILURE OF SHIPPER TO READ TERMS. — The plaintiff entered into a written contract for the transportation of goods by the defendant to a point beyond its line, by which the defendant assumed responsibility for the carriage of the goods by the line to which it was to deliver them. The goods were shipped and afterwards a bill of lading was issued containing a stipulation that the defendant would not be liable beyond its own line. The plaintiff hypothecated the bill of lading without reading it. *Held*, that the original contract controls. *Northern Pacific Ry. Co. v. American Trading Co.*, 25 Sup. Ct. Rep. 84.

Generally, in the absence of fraud, acceptance of a bill of lading by a shipper makes it the contract of carriage according to its terms, whether the shipper has read them or not, and notwithstanding that they are inconsistent with a prior oral agreement. *Germania Fire Insurance Co. v. Memphis, etc., R. R. Co.*, 72 N. Y. 90; *Grace v. Adams*, 100 Mass. 505. The custom of carriers to issue bills of lading containing limitations is so general that every person dealing with them may be fairly charged with a duty to read the bill, and with knowledge of its contents and assent thereto if he fails to read. It would seem that business custom would charge one with this implied assent as much when the previous contract was written as when oral, and that the fact that the goods had gone forward before the issuance of the bill would not affect this assent. *Contra, Bostwick v. Baltimore, etc., R. R. Co.*, 45 N. Y. 712. On this reasoning the result of the principal case appears questionable. But, though the point was not considered by the court, the defendant apparently gave no consideration for the inconsistent terms of the bill, and the case might have been rested on that ground.

CONFLICT OF LAWS — BANKRUPTCY AND INSOLVENCY — WHETHER STATE LAW GOVERNS ADMISSIBILITY OF CLAIM IN BANKRUPTCY COURT. — Under a statute regulating the rights of married women the state courts had held that a claim by a married woman for money loaned to her husband from her separate estate was not enforceable either in law or in equity. The plaintiff, a married woman, sought to prove in a court of bankruptcy a claim for money loaned from her separate estate to an insolvent firm of which her husband was a partner. *Held*, that the claim is allowable. *James v. Gray*, 131 Fed. Rep. 401 (C. C. A., First Circ.).

The federal courts sitting in the different states regularly seek to follow the rules of law which prevail in those states. *Detroit v. Osborne*, 135 U. S. 492. Their jurisdiction in equity, however, is said to allow them to administer an equity of their own, independent of the rules prevailing in the various states. *Neves v. Scott*, 13 How. (U. S.) 268. Under this doctrine, the claim in the principal case being merely equitable, the court of bankruptcy, sitting with equitable powers, felt that it could decide whether it was valid or not without regard to the previous state decisions. This view may be further reinforced by the theory that, since the federal courts have a concurrent jurisdiction with the courts of the state, they are in no way bound to follow the decisions of the latter. *Cf. Swift v. Tyson*, 16 Pet. (U. S.) 1. Upon the weight of authority, however, it would seem that both in law and in equity the substantive rights of parties under contracts made within the state should be controlled by the construction placed by the state courts upon the statutes regulating such contracts. *Missouri, etc., Co. v. Kruming*, 172 U. S. 351; *Lloyd v. Fulton*, 91 U. S. 479.

CONFLICT OF LAWS — LIABILITY OF STOCKHOLDERS — WHAT LAW GOVERNS. — By its articles of incorporation an English limited company was empowered to appoint an agent to do all such acts as might be necessary to comply with the law of any country where it might carry on business. It transacted business in California, where each stockholder of a corporation was, by statute, individually liable for its debts. The plaintiff sued the defendant, a stockholder, in England for a debt contracted by the company in California. *Held*, that the plaintiff cannot recover. *Risdon Iron and Locomotive Works v. Furness*, 21 T. L. R. 179 (Eng., K. B. D.). See NOTES, p. 452.

CONSTITUTIONAL LAW — CLASS LEGISLATION — ACT ALLOWING PRIVATE CLAIM AGAINST STATE — The Constitution of New York provided that the legislature should not "allow any private claim against the state." Const. (1874) Art. 111, § 19. The state conveyed land to the plaintiff for value by letters patent which should "in

no case operate as a warranty of title." The title proving invalid, a special enactment conferred jurisdiction on the Court of Claims to determine the plaintiff's claim for damages and to enter judgment therefor. *Held*, that although the enactment authorizes a judgment for the plaintiff despite the lack of warranty, it does not violate the constitution. Two justices dissented. *Wheeler v. State of New York*, 97 N. Y. App. Div. 276.

The New York courts have upheld special enactments authorizing the Court of Claims, in actions for labor and materials furnished the state, to disallow the defense of lack of authority on the part of the officials who contracted. *American Bank Note Co. v. State of New York*, 64 N. Y. App. Div. 223. Obviously, the legislature, having power to authorize officials to execute certain contracts, has power to ratify the acts of officials in executing such contracts in excess of their authority. *O'Hara v. State of New York*, 112 N. Y. 146. The aim of the act in the principal case differed materially. The letters patent expressly excluded any warranty, which, furthermore, could not be implied in New York. 3 R. S., 2d ed., 2638, § 216; *Burwell v. Jackson*, 9 N. Y. 541. The statute as construed purports, not merely to waive a technical defense to an otherwise valid, existing obligation, but to allow a private claim against the state where none before existed. The same court upon substantially the same facts construed an enactment directing an award of "such damages as shall be just and equitable," as not waiving the defense of lack of warranty. *Killam v. State of New York*, 64 N. Y. App. Div. 243. But if the construction of the present statute be supported, the result, though perhaps desirable, seems difficult to reconcile with technical principles.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTE AUTHORIZING SUBPÆNA TO COMPEL CITIZEN OF ONE STATE TO TESTIFY IN ANOTHER. — A New York statute authorized the granting of a subpoena to compel a resident of that state to appear as a witness in a criminal prosecution pending in Pennsylvania. *Held*, that the statute is unconstitutional, as depriving a person of his liberty without due process of law. *In re Commonwealth of Pennsylvania*, 90 N. Y. Supp. 808.

Although the phrase, "due process of law," as contained in the Fourteenth Amendment cannot be defined with exactness, it may be said in general that this amendment forbids any novel procedure depriving a person of his life, liberty, or property without due notice and an opportunity of being heard in his own defense. See *Holden v. Hardy*, 169 U. S. 366, 389. In the present case, as the court points out, the obvious result of the statute would be to deprive a person of his liberty without a hearing, and, in effect, to banish him temporarily from the state. As this procedure is novel, it cannot be supported as sanctioned by the common law prior to the adoption of the amendment. Furthermore, since the statute was not passed in the interest of the people of New York, it cannot be regarded as an exercise of the police power, which was in no way restricted by the Fourteenth Amendment. *Cf. Lake Shore, etc., Ry. Co. v. Ohio*, 173 U. S. 285; *Burbier v. Connolly*, 113 U. S. 27. It would therefore seem clear that the statute was unconstitutional.

CONTRACTS — DEFENSES: FRAUD — VALIDITY OF FRAUDULENTLY OBTAINED CONTRACT PURPORTING TO WAIVE DEFENSE OF FRAUD. — A written contract between the plaintiff and the defendant recited that it was made under the representations therein expressed and no others. To a suit thereon, the defendant pleaded fraudulent parol misrepresentations. *Held*, that the defendant is estopped to set up this defense. *Equitable Mfg. Co. v. Biggers*, 49 S. E. Rep. 271 (Ga.).

It is a general rule of law that simple contracts, even though written, are voidable, if obtained by material misrepresentations of present facts, whether such misrepresentations be embodied in the contracts themselves or be oral and *dehors*. *Newman v. Smith*, 77 Cal. 22. The present case cannot be taken out of the rule on the ground of estoppel; for the recital in the contract could not have altered the plaintiff's belief as to any representations which he may himself have made: nor can the conclusion of the court be sustained on the ground that there was a binding agreement to waive the defense of fraud; for the very waiver being part of the fraudulently obtained contract, was itself obtained by fraud and invalid. *Universal Fashion Co. v. Skinner*, 71 Hun (N. Y.) 293; *Bridger v. Goldsmith*, 143 N. Y. 424. There is a tendency to hold that insurance policies may, by their own stipulations, be incontestible for fraud after a lapse of time. *Wright v. Mutual, etc., Ass'n of America*, 118 N. Y. 237. Still the incontestible clause cases are neither unanimous in result nor consistent in reasoning, and furnish company rather than an excuse for the decision in the principal case. *Cf. Welch v. Union, etc., Co.*, 108 Ia. 224.

CONTRACTS — OPTIONS — RIGHTS OF ASSIGNEE OF OPTION TO PURCHASE LAND. *Held*, that an assignee of an option to purchase land will not be given specific performance. *Rease v. Kittle*, 49 S. E. Rep. 150 (W. Va.). See NOTES, p. 457.

CORPORATIONS — STOCKHOLDERS — INDIVIDUAL LIABILITY OF TRANSFERRED OF STOCK OF INSOLVENT BANK. — *Held*, that a stockholder of an insolvent national bank is discharged from individual liability to creditors of the bank if he has transferred his shares to a person able to perform the obligations thereby cast upon him. *McDonald v. Dewey*, 37 Chi. Leg. N. 174 (U. S., C. C. A., Seventh Circ. Oct. Term, 1904). See NOTES, p. 455.

CORPORATIONS — ULTRA VIRES — EFFECT OF IMPROPER EXERCISE OF BORROWING POWER. — A corporation, having general power to borrow money for the purposes of its business, exercised that power for another purpose. *Held*, that, in the absence of notice by the lender of the improper purpose of the transaction, the misapplication of the money does not invalidate the loan. *In re David Payne & Co., Limited*, [1904] 2 Ch. 608. See NOTES, p. 463.

CORPORATIONS — ULTRA VIRES — EFFECT OF ULTRA VIRES TRANSACTIONS. — The defendant, a national bank, purchased stock in another bank and received dividends thereon. *Held*, that since the purchase was *ultra vires*, the defendant is not liable for an assessment levied by the comptroller of the currency. *Shaw v. National, etc., Bank*, 132 Fed. Rep. 653 (C. C. A., Eighth Circ.).

A Missouri corporation, in excess of its charter powers, purchased stock in a Kansas corporation. *Seem*, that the transfer of stock to the Missouri corporation is void. *Anglo-American, etc., Co. v. Lombard*, 132 Fed. Rep. 721 (C. C. A., Eighth Circ.). See NOTES, p. 461.

CRIMINAL LAW — ESTOPPEL — PRISONER ESTOPPED TO DENY LEGALITY OF HIS ACTS. — The prisoner, a county officer, being indicted for misfeasance in office, pleaded that as the grand jury had been selected from an irregular jury list, its acts were void. As such officer, he had himself selected this list and sworn to its legality. *Held*, that he is estopped to deny the legality of the grand jury. *State ex rel. Clark v. Second Judicial District Court*, 78 Pac. Rep. 769 (Mont.).

It has been held that if a person makes away with money which he has received upon his false representation that he is the agent of another and that he accepts the money for his alleged principal, he may be punished for the crime of embezzlement. *State v. Spaulding*, 24 Kan. 1; *contra*, *Moore v. State*, 53 Neb. 831. As in the present case, this result is reached on the ground that the prisoner is estopped to deny what he represented to be true. This reasoning can hardly be supported. The state should punish a person only for doing it an injury, and should conduct the trial in a legal and regular manner. Hence the false representation of a person which, if true, would result in his criminal liability, or his false statement that a certain procedure is legal, should not form the basis for the infliction of punishment; for, in the first instance, the injury for which he is being punished has not really been done, and in the second he is not in fact being legally tried. *Cf.* 12 HARV. L. REV. 56.

CRIMINAL LAW — STATUTORY OFFENSES — INTERPRETATION OF STATUTE PENALIZING SALE OF OLEOMARGARINE. — A statute made it a penal offense to sell oleomargarine containing coloring matter. Under a law requiring all persons who offered oleomargarine for sale to sell to any person presenting the purchase price a sample for purposes of analysis, a state inspector purchased some of the defendant's oleomargarine, which was found to contain coloring matter. *Held*, that the defendant may be convicted of the statutory offense. *State v. Rippeth*, 71 Oh. St. 326.

The effect of this decision is to punish the defendant for doing what he was legally bound to do. In view of the harshness of this result, it might be argued that the legislature meant to exclude sales to inspectors from the operation of the act. On the other hand, there are strong reasons for the present literal construction. Generally, courts are inclined to be strict in their interpretation of statutes concerning the sale of adulterated or injurious foods. Thus a criminal intent is an unnecessary element in the crime. *Commonwealth v. Farren*, 9 Allen (Mass.) 489. The fact that the article was not to be used for human consumption is held immaterial. *Cf.* *Commonwealth v. Raymond*, 97 Mass. 567; *contra*, *Schmidt v. State*, 78 Ind. 41. Broadly speaking, the tendency of legislation is to prevent all dealings with colored oleomargarine; and as the present statute, which is very comprehensive in its scope, reflects the same temper, the court may be supported in giving the fullest possible effect to its terms. *Cf.* Ann. Code Ia. (1897) § 2516.

ELECTIONS — EFFECT OF IMPROPER EMBLEM ON VALIDITY OF BALLOTS. — A statute made it a penal offense to circulate, for election purposes, ballots bearing the chosen emblem but not the names of all the candidates of a political party. One party furnished ballots bearing an emblem which was very similar to that of another but

which did not deceive the voters who cast them. *Held*, that as the statute is directory only, the ballots are not invalid. *Esquibel v. Chaves*, 78 Pac. Rep. 505 (N. Mex.).

Statutes regulating the preparation and canvassing of ballots are generally construed as merely directory, even though they make the violation of their provisions criminal. Consequently ballots which do not exactly comply with such provisions and are technically irregular, are not rejected, if such irregularities have not affected the result of the election by misleading voters. *Blankinship v. Israel*, 132 Ill. 514; *Kellogg v. Hickman*, 12 Col. 256. If the statutes provide that such irregularities shall render ballots void, they are obviously mandatory and the ballots cannot be counted, however clear the intention of the voters. *Kearns v. Edwards*, 28 Atl. Rep. 723 (N. J.). And if the enactment prescribes the manner in which voters shall mark or stamp ballots, it is generally held mandatory, though without express provision that ballots not complying therewith shall be void. *In re Flynn*, 181 Pa. St. 457; *Murphy v. San Luis Obispo*, 119 Cal. 624. There is apparently no inconsistency in these propositions. Where such statutes are not expressly mandatory, it may well be the intention of legislatures that the voter be held to full knowledge of the law and required to express his intention in the legally competent manner; but not that he be disenfranchised by the irregularities of others over whom he has no control.

ESTOPPEL — ESTOPPEL IN PAIS — FAILURE TO ACT. — The plaintiff bank placed money to the credit of a depositor on the security of warehouse receipts purporting to have been issued by the defendant. The plaintiff notified the defendant of this loan by letter, but the defendant, though it knew that the receipts were forgeries, made no reply until after the depositor had withdrawn the amount of his account and failed. *Held*, that the defendant is liable by estoppel for that loss which it might have saved the plaintiff, if it had answered the letter promptly. *Commercial National Bank v. Nacogdoches, etc., Co.*, 133 Fed. Rep. 501 (C. C. A., Fifth Circ.). For a discussion of the principles involved, see 18 HARV. L. REV. 140.

EVIDENCE — CHARACTER — VICIOUS CHARACTER OF DECEASED TO PROVE VICIOUS ACT. — The defendant in a homicide case testified that, a short time before the killing, he had seen the deceased in adultery with the defendant's wife, daughter of the deceased. *Held*, that in determining the degree of the murder, evidence of the deceased's character is admissible, as tending to show that he was guilty of the act alleged. *Orange v. State*, 83 S. W. Rep. 385 (Tex., Cr. App.). See NOTES, p. 459.

EVIDENCE — EVIDENCE OF HANDWRITING — TESTING WITNESS BY WRITINGS ONLY PARTIALLY DISCLOSED. — In an action upon a promissory note, after denying the genuineness of the maker's signature, a non-expert witness was shown documents, apparently already in evidence, so covered as to leave visible only the signatures, and was asked whether the latter were genuine. *Held*, that the witness is not entitled to see the entire document before expressing an opinion. *Groff v. Groff*, 209 Pa. St. 603.

A witness to handwriting, whether expert or not, may on cross-examination be tested by writings which are properly in evidence or are admitted by the parties or the witness to be genuine. Whether he may be questioned as to writings not already in evidence is in conflict. Where the handwriting of an instrument is disputed, it has been held not error to require an expert to be shown the entire document. *West v. State*, 22 N. J. Law 212, 240. The opposite result has been reached in the case of expert or non-expert witnesses examined as to signatures. *Brown v. Woodward*, 75 Conn. 261; *Hoag v. Wright*, 174 N. Y. 36; *contra*, *Insurance Co. v. Throop*, 22 Mich. 146. If the signature only is disputed and the witness's knowledge is not limited to the alleged author's signature on a particular class of documents, the practice employed in the principal case seems unobjectionable. Generally, the question should rest with the discretion of the trial judge. It should be noticed that the decision of the precise question under discussion should not vary whether or not the court is one of those which allow witnesses to be tested by documents extrinsic to the issue.

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — JURISDICTION IN EMINENT DOMAIN PROCEEDINGS. — A proceeding for the taking of land by eminent domain was begun in a state court by a domestic corporation against a corporation of a different state. *Held*, that the case may be removed to the federal court upon petition by the foreign corporation. *Fuller, C. J.*, and *Holmes, Brewer, and Peckham, JJ.*, dissented. *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 25 Sup. Ct. Rep. 251.

In accordance with a literal interpretation of the Constitution and the Judiciary Act of 1887-8, the majority of the court, following an earlier case, holds that this is a controversy between citizens of different states and therefore removable to the circuit court. *Cf. Searl v. School District No. 2*, 124 U. S. 197. On the other hand, it is

argued by the minority that this, though in form a controversy between citizens, is in substance an exercise by the state of its sovereign right of eminent domain with which the United States cannot interfere. See *Boom Co. v. Patterson*, 98 U. S. 403, 406. That the form of the controversy is not always conclusive, is shown by the case suggested in the dissenting opinion, where the jurisdiction of the United States courts is denied in suits by citizens of one state against officers of another, if the action is in effect against the state. *Smith v. Reeves*, 178 U. S. 436. While the reasoning of the minority might well have led the court to reach the opposite result if the question had been *res nova*, yet the decision may be logically supported without departing from the letter of the Constitution or the statute, and should therefore be regarded as settling the law.

FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS — CONVEYANCE BY HUSBAND TO WIFE IN PERFORMANCE OF CONTRACT. — A wife conveyed land to her husband, for use in business, upon an unrecorded written agreement to reconvey when he went out of business. When he decided to do this, some years later, he executed and put on record a deed of the land to his wife, but was at the time insolvent. *Held*, that his trustee in bankruptcy may avoid the conveyance. *Lavender v. Bowen*, 101 N. W. Rep. 760 (Ia.).

Under the National Bankruptcy Act, §§ 67 e, 70 e, the trustee can avoid any transfer made by the bankrupt which any creditor might have avoided under the laws of the state in which the property transferred is situated. Though the mere acceptance by a husband of property from his wife does not imply an obligation to reconvey as against his creditors, a promise to repay given in exchange for the transfer will support a subsequent conveyance. *Steadman v. Wilbur*, 7 R. I. 481. The simple fact that creditors have advanced money in reliance upon the husband's title to such property does not enable them, by estoppel or otherwise, to avoid a retransfer to the wife. *Payne v. Wilson*, 76 Ia. 377. The burden of proving a valid consideration for the conveyance rests upon the wife, but by the better view the burden of proving fraud is upon the creditor who asserts it. *Evans v. Rugee*, 57 Wis. 623. The law of Iowa has heretofore seemed to accord with these principles. *Garr, Scott & Co. v. Klein*, 93 Ia. 313; *Neighbor v. Hoblitzel*, 84 Ia. 598. And the facts reported in the present case seem hardly sufficient to create an estoppel or support an inference of fraud. In fact, they appear even to disclose a trust. *Cf. Brisco v. Norris*, 112 N. C. 671.

GAME — NATURE OF LANDOWNER'S RIGHT TO SHOOT ON HIS OWN LAND. — *Held*, that an Arkansas statute forbidding non-residents to shoot and fish in the state violates the Fourteenth Amendment in that it deprives non-residents owning land within the state of a property right which resident owners enjoy. *State v. Mallory*, 83 S. W. Rep. 955 (Ark.). See NOTES, p. 458.

INSURANCE — INSURANCE AGENTS — AGENT ACTING IN BEHALF OF INSURED TO FILL OUT APPLICATION. — A contract of insurance provided that the person soliciting or taking the application should be the agent of the insured as to all statements and answers made therein. *Held*, that the solicitor does not become the agent of the insured. *Reilly v. Empire Life Insurance Co.*, 90 N. Y. Supp. 866.

In an earlier New York case it was held that a medical examiner was the agent of the insurance company notwithstanding a stipulation to the contrary. See 15 HARV. L. REV. 859. The present decision extends the rule to the case of soliciting agents.

INTERSTATE COMMERCE — WHAT CONSTITUTES — AGREEMENT BY BEEF DEALERS IN RESTRAINT OF INTERSTATE TRADE. — A number of dealers controlling sixty per cent of the commerce in fresh meats in the United States, entered into an agreement restraining their bidding against each other for live stock, much of which was sent from other states than that in which the bidding was done. They further agreed to regulate among themselves the prices of meat to be sold in other states, and the charges for its cartage and delivery, and made arrangements with common carriers for unfair discrimination in rates. To a bill for an injunction filed on behalf of the federal government, the defendants demurred. *Held*, that the injunction should be granted. *Swift & Co. v. United States*, 25 Sup. Ct. Rep. 276.

For a discussion of the principles involved, see 16 HARV. L. REV. 522.

JUDGMENTS — ESSENTIALS TO VALIDITY — DEFAULT FOR FAILURE TO ANSWER. The code of Montana provided that if no answer were filed to a complaint within the time specified by the summons or such further time as should be granted, the default of the party should be entered. A defendant moved to quash the service of summons as insufficient. Before the motion came to be argued the twenty days specified in the summons expired and a default was entered. The motion was afterwards

denied and the defendant claimed a right to plead to the merits. *Held*, that the judgment by default stands. *Mantle v. Casey*, 78 Pac. Rep. 591 (Mont.).

In courts governed by codes similar to that of Montana a demurrer has been held to be such answer as complies with the provision and prevents default. *Oliphant v. Whitney*, 34 Cal. 25. But it has also been held, in line with the present case, that a motion of this sort, concerning matters preliminary or collateral to the issue, is not such answer. *Higley v. Pollock*, 21 Nev. 198. There is little or no authority for the opposite view. See *Lyman v. Bechtel*, 55 Ia. 437. A general appearance seems to be required, except in states which, like Colorado, expressly name a motion as sufficient to prevent default. It might be said that in the principal case the defendant should have asked for an extension of the time for answering. But a dissenting justice argues that such a request would amount to a general appearance and an admission of the jurisdiction which the defendant denies. Cf. *Yale v. Edgerton*, 11 Minn. 271; *contra*, *Powers v. Braly*, 75 Cal. 237. Where this is so the use of a motion to quash is rendered hazardous unless the defendant is sure of his ground or can secure an immediate hearing. The result, however, is perhaps satisfactory so far as it discourages technical and dilatory motions.

MARSHALING ASSETS AND SECURITIES — FORECLOSURE OF MORTGAGES — EQUAL EQUITIES. — Part of property subject to three mortgages was taken for a railroad. Pending a suit for compensation, which was to be subject to the mortgages, the third mortgagee was cut out of the remaining land by foreclosure of the second mortgage. He then sought to marshal the first mortgage against the remaining land in favor of the compensation fund. *Held*, that the first mortgage is to be paid ratably from the land and the compensation money. *Bates v. Boston Elevated R. Co.*, 72 N. E. Rep. 1017 (Mass.). See NOTES, p. 453.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — CONDITION OF STREETS. — A city authorized an excavation under a public sidewalk, and the construction of a temporary bridge over the opening. Under the weight of a crowd, the bridge gave way. *Held*, in an action for the death of a person injured thereby, that there is no evidence to support a verdict against the city, but that it is a question for the jury whether the contractors who built the bridge were negligent in its construction. *Coolidge v. City of New York*, 90 N. Y. Supp. 1078.

A city is under a duty to keep its streets in reasonably safe condition. While not an insurer, it must use due care, and this duty of care cannot be delegated. *Village of Jefferson v. Chapman*, 127 Ill. 438. Hence the city is liable for injuries due to the dangerous condition of highways obstructed by city works, though the danger is caused by the negligence of independent contractors. *Storrs v. City of Utica*, 17 N. Y. 104; *City Council v. Cone*, 91 Ga. 714. It is not liable for their negligence when it does not affect the condition of the way. *Herrington v. Village of Lansingburgh*, 110 N. Y. 145. This duty being the basis of liability, the same reasoning applies where work is done in a street, for private persons under the city's license. *Hayes v. West Bay City*, 91 Mich. 418. In the principal case, since the city had notice that a dangerous opening had been made, a finding that the opening was negligently protected, no matter who was charged with the immediate duty of making the bridge safe, seems as conclusive against the city as against the contractor.

PLEADING — DEFENSE OF PURCHASE FOR VALUE. — After conveying land to the plaintiff the grantor mortgaged it to the defendant, whose deed was recorded before that of the plaintiff. *Held*, on a bill to quiet title, that the burden is on the plaintiff to prove that the defendant is not a *bona fide* purchaser. *Sheldon v. Powell*, 78 Pac. Rep. 491 (Mont.).

The principles governing the pleading of a *bona fide* purchase vary according to the substantive rights involved. In the first class are cases analogous to those in which a trustee transfers the trust property. The *cestui's* equitable right is thereby extinguished. See 18 HARV. L. REV. 53. To make out a new right against the purchaser he must prove bad faith. *McNeil v. Magee*, 5 Mas. (U. S.) 244. Second, in cases like actions by a land-owner to recover his title-deeds, since title-deeds follow the land, equity will grant relief, unless the holder defend by proving that he is an innocent purchaser. *Walkwyn v. Lee*, 9 Ves. Jun. 24. Finally, in actions like the present, where the defendant records his title without notice of a prior unrecorded deed to the plaintiff, in jurisdictions where the person recording acquires title, the plaintiff must proceed in equity and charge the defendant's conscience by proving notice. *McNeil v. Magee*, *supra*; cf. *Phifer v. Barnhart*, 88 N. C. 333. If however, by statute, one recording with notice get no title, the plaintiff must bring ejectment, and, to prove his right of entry, show that the defendant, because of bad faith, acquired no title. *Anthony v. Wheeler*, 130 Ill. 128.

POLICE POWER—REGULATION OF BUSINESS AND OCCUPATIONS—HORSESHOERS REQUIRED TO PASS EXAMINATION.—A statute was enacted providing for the examination and registration of horseshoers in certain cities. *Held*, that the statute is unconstitutional as an illegitimate exercise of the police power. *In re Aubrey*, 78 Pac. Rep. 900 (Wash.).

This seems to be a sound application of the principles which determine the limitations of the police power in regulating occupations. For a discussion of these principles in connection with a case holding a requirement of examinations for plumbers constitutional, see 17 HARV. L. REV. 356.

PRESUMPTIONS—DEATH AFTER SEVEN YEARS—DECLARATIONS AGAINST INTEREST.—*Held*, that an absconding solicitor, although he may have remained absent to avoid the ordeal of public bankruptcy, is presumed to be dead when he has not been heard of for seven years, and his entries of collections are admissible in evidence as declarations against interest. *Wills v. Palmer*, 53 W. R. 169 (Eng., Ch. D.).

By the common law, in the absence of proof of death, life is presumed to continue. From ancient statutes, relating to bigamy and life estates, has been adopted the counter-presumption of death after seven years' absence without intelligence. *Cf. Burr v. Sim*, 4 Whart. (Pa.) 150, 170. But the rule is practically uniform that such presumption arises only when no news has been received by persons likely to hear from the absentee; and is rebutted by circumstances fairly explaining his silence consistently with life. *Bowden v. Henderson*, 2 Sm. & G. 360. In the light of these authorities this decision seems ill-considered, but cases are infrequent which apply the presumption merely to render evidence admissible, and that situation may require a less exacting rule than where property interests are directly involved. *Cf. Manby v. Curtis*, 1 Price 225, 229. The court thus circumvents the prevailing doctrine that declarations against interest are admissible only after the declarant's death. *Stephen v. Gwenap*, 1 Moo. & R. 120; see *contra*, *Shearman v. Atkins*, 4 Pick. (Mass.) 283, 293. It would seem more logical to apply the presumption of death uniformly, and either reject the evidence entirely, or, on analogy with similar cases, extend the doctrine admitting such declarations to include those of absentees. *Cf. North Bank v. Abbot*, 13 Pick. (Mass.) 465, 471.

QUIETING TITLE—BILL TO REMOVE VENDOR'S LIEN WHEN CLAIM FOR PURCHASE PRICE IS BARRED BY LIMITATIONS.—The plaintiff purchased land from the defendant, who retained a vendor's lien as security for the purchase-money note. Both the lien and the note being barred by the statute of limitations, the plaintiff filed a bill to have the lien removed as a cloud upon his title. *Held*, that the bill can be granted only on condition that the plaintiff pay for the land. *Cassell v. Lowry*, 72 N. E. Rep. 640 (Ind., Sup. Ct.).

It is true that equity will not as a rule allow a title otherwise unimpeachable to be clouded by a claim which can never be successfully enforced, since such a claim can result only in oppression and useless reduction of value. *Steam, etc., Co. v. Jones*, 21 Blatchf. (U. S.) 138. Accordingly a disseisor who has acquired land by adverse possession for the statutory period is entitled to a decree of a court of equity making his title perfect of record. *Arrington v. Liscom*, 34 Cal. 365. The fact that in Indiana the running of the statute of limitations against the debt bars also the lien which secures it, would seem at first sight to bring the present case within these principles, since the plaintiff is in possession of the land with a title which no one can dispute. But though the statute limiting personal actions bars all remedies, it does not, like the statute applicable to realty, extinguish the right. Under such circumstances the court is right in denying relief till such obligation is discharged. *Booth v. Hoskins*, 75 Cal. 271.

RESTRAINT OF TRADE—CONTRACTS TO EMPLOY ONLY UNION MEN—VALIDITY.—The plaintiff prayed an injunction decreeing that his employer should not, in pursuance of a contract with a labor union, discharge him as a non-union man; and that the members of the union should not strike to procure his discharge. *Held*, that the injunction against the employer should be denied, and the injunction against the union modified so as to permit peaceable striking, boycotting, or picketing. *Mills v. United States, etc., Co.*, 91 N. Y. Supp. 185.

The plaintiff union sued the defendant under a contract by which the defendant had agreed to employ only union men in good standing. *Held*, that the contract is against public policy and cannot support an action. *Jacobs v. Cohen*, 90 N. Y. Supp. 854.

It once seemed that the law of New York on the liability of unions for procuring the discharge of non-union employees by threats of striking was settled in practical accordance with the present rule in England and Massachusetts. *Curran v. Gulen*, 152 N. Y. 33; *Quinn v. Leathem*, 70 L. J. P. C. 76; *Plant v. Woods*, 176 Mass. 492. But in 1902 the question was reopened by a strong assertion of the legality of

such action. *National Protective Ass'n v. Cumming*, 170 N. Y. 315. The two recent Supreme Court cases, considered together, affirm but limit this latter rule. In the first case the court allows the employer to discharge non-union men according to contract, and permits the other parties to the pact to strike peaceably to procure such discharge. They may adjust matters between themselves. In the second case the court refuses to punish non-compliance with the agreement. If these cases stand as law they place contracts to employ only union members in the category of those agreements whose performance the courts will neither forbid nor assist; and point out another act which, like taking usury and refraining from marriage, is impolitic but not illegal.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY—CHANGE IN CHARACTER OF LOCALITY AS GROUND FOR REFUSING INJUNCTION WHERE DURATION OF COVENANT IS LIMITED.—In an action brought to enjoin the erection of an apartment house upon the defendant's premises in violation of a covenant entered into by a former owner from whom the defendant had bought with notice, the defense was interposed that the character of the neighborhood had so changed as to render an enforcement of the agreement inequitable. The covenant between the original parties had at first been without limitation, but was shortly afterward modified so as to expire in twenty-five years. *Held*, that an injunction will be granted, since the modification of the agreement shows conclusively that the parties intended it to be strictly enforced during the time limited for its operation. *McClure v. Leaycraft*, 97 N. Y. App. Div. 518.

Courts of equity will not decree specific performance of agreements restricting the use of land where the character of the locality has so changed as to defeat the purpose of the agreement and to render its enforcement of little benefit to the plaintiff and a great hardship to the defendant. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Jackson v. Stevenson*, 156 Mass. 496. The fundamental question in each case should be, whether under the circumstances the relief sought would be equitable. In determining this question, the fact that the parties have shown or expressed an intention to make the covenant binding regardless of changes in the neighborhood should be merely a circumstance in favor of granting the decree, to be given more or less weight as the suit is between the original parties, or between subsequent purchasers from them. Likewise, the fact that the covenant is limited to a short period of years may make its enforcement less inequitable, but should hardly be conclusive. *Cf. Page v. Murray*, 46 N. J. Eq. 325.

SPECIFIC PERFORMANCE—GENERAL NATURE AND SCOPE OF EQUITABLE RELIEF—INSOLVENCY.—The plaintiff sought specific performance of a contract for the sale of cattle, alleging payment of the purchase price and the defendant's insolvency. *Held*, that the bill will not lie. *Hendry v. Whidden*, 37 So. Rep. 571 (Fla.). See NOTES, p. 454.

TAXATION—COLLECTION AND ENFORCEMENT—ASSUMPTION OF INVALID TAXES.—The plaintiffs obtained title to certain land by a deed reciting that it was subject to taxes which the purchasers agreed to pay as a part of the consideration. Having subsequently ascertained that the taxes were invalid, the plaintiffs sued for an injunction to restrain the city from collection. *Held*, that the plaintiffs are estopped to deny the validity of the taxes. *Eddy v. City of Omaha*, 101 N. W. Rep. 25 (Neb.).

If the city's claim upon its debtor's promisor be recognized as purely derivative and founded upon doctrines analogous to those governing statutory garnishment, it seems difficult to uphold this result, since the creditor's right against his original debtor has failed. In cases of the assumption of mortgages it is frequently said that where the mortgagor was not originally liable to the mortgagee, the latter has no right against the mortgagor's grantee. *Ward v. De Oca*, 120 Cal. 102. Yet in a large class of cases the grantee's promise is construed as one not merely to indemnify, but to pay an alleged debt, the possible invalidity of which his grantor has waived. See *Freeman v. Auld*, 44 N. Y. 50; *Kennedy v. Brown*, 61 Ala. 296. This interpretation seems equally applicable to the case of assumption of invalid taxes. It would seem, however, that it is to be applied with caution, and only where a fair interpretation of the contract of the original parties clearly justifies it. It has been rejected in isolated cases of the assumption of invalid mortgages as well as of invalid taxes. See *Goodman v. Randall*, 44 Conn. 321; *State v. Mayor of Jersey City*, 35 N. J. Law 381. As to the applicability of principles of estoppel, see 17 HARV. L. REV. 497.

TITLE, OWNERSHIP, AND POSSESSION—THINGS SUBJECT TO OWNERSHIP AS PROPERTY—OYSTERS.—Under a statute, the plaintiff and defendant enjoyed per-

petual franchises of adjoining tracts under the waters of Long Island Sound for purposes of shellfish cultivation. The plaintiff, supposing the defendant's land to be his own, deposited oyster shells upon it so that young oysters in the free-swimming larval stage became attached to the shells and developed into marketable oysters. The defendant having taken these oysters was sued for conversion. *Held*, that the plaintiff can recover, as the property is in him. *Vroom v. Tilly*, 91 N. Y. Supp. 51.

Whether property in oysters is governed by the general law of original acquisition and disseisin of chattels or by its special branch relating to wild animals has been a puzzling question. Oysters have been variously regarded as being analogous to: (1) animals *ferae naturae*; (2) inanimate personality; (3) *ferae naturae* until taken and thereafter inanimate chattels; (4) emblems. See (1) *McCarty v. Holman*, 22 Hun (N. Y.) 53; (2) *State v. Taylor*, 27 N. J. Law 117; *cf.* (3) *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42; (4) *Huffmire v. City of Brooklyn*, 22 N. Y. App. Div. 406. This interesting case seems to test the nature of the property right. Whatever the status of adult oysters, the free-swimming form seems more nearly *ferae naturae*, and if such, when taken by a trespasser title would be in the owner of the land or privilege. *Blades v. Higgs*, 11 H. L. Cas. 621. Again, though the shells sown remain the plaintiff's personality, it is difficult to say that the young oysters are the increase of such chattels. But see *Grace v. Willets*, 50 N. J. Law 414. If the shells be regarded either as seed or as realty to which the oysters became attached, the defendant's case is even clearer. The analogy to animals *ferae naturae* seems the most helpful, but on whatever reasoning, the court might well have decided for the defendant.

TRANSFER OF STOCK — ATTACHMENT BY CREDITOR WHERE TRANSFER NOT RECORDED — RIGHTS WHERE CREDITOR HAS ACTUAL NOTICE. — A statute provided that no unregistered transfer of stock should be valid against the creditors of the stockholders. *Held*, that an attaching creditor prevails over an unregistered transferee even though he has actual knowledge of the transfer. *Scott v. Hought*, 83 S. W. Rep. 1057 (Ark.).

Under statutes making stock transferable only on the books of the company, the courts have not generally invalidated unrecorded transfers, but have given the assignee at least an equitable interest in the stock. *Kellogg v. Stockwell*, 75 Ill. 68. Accordingly, the transferee's interest has been held sufficient to entitle him to sue the directors for misconduct. *Parrott v. Byers*, 40 Cal. 614. So too such a transfer is good against the transferor's assignee in bankruptcy. *Dickinson v. Central National Bank*, 129 Mass. 279. And, again, by the great weight of authority and contrary to the principal case, an attaching creditor having notice of the unregistered transfer is not protected. *Bridgewater Iron Co. v. Lissberger*, 116 U. S. 8. The latter rule seems correct. The purpose of statutes requiring registration is to prevent fraud by giving notice to all persons dealing with the stock. Under such circumstances actual notice should be treated as equivalent to registration. Furthermore, since the objects of these statutes are largely the same as those of recording acts, the principal case would seem inconsistent with the line of decisions in the same state as to unrecorded deeds, where a purchaser having actual notice is not protected. *Cf. Byers v. Engles*, 16 Ark. 543.

TRUSTS — RESULTING TRUSTS — EFFECT OF INDETERMINATE CONTRIBUTION TO PURCHASE PRICE. — Property was bought in the name of a married woman out of a fund arising from the earnings of the husband, the wife, and adult and minor children. The exact proportion contributed by the husband and minor children was not ascertainable. *Held*, that no trust results in favor of the husband. *Onasch v. Zinkel*, 72 N. E. Rep. 716 (Ill.).

Almost universally, when several persons contribute proportionate shares to the purchase price of land conveyed to one, a trust results in their favor. It is often stated that the share must be some aliquot portion of the whole amount (*i. e.* one-third, one-fifth, etc.), giving a proportionate aliquot interest in the land. *McGowan v. McGowan*, 14 Gray (Mass.) 119. Such seems to be the rule in Illinois. But see *Fleming v. McHole*, 47 Ill. 282. A more reasonable rule obtains in most jurisdictions, where any fraction has been allowed; so long as a definite share is found, a trust arises to the extent of the contribution. *Currence v. Ward*, 43 W. Va. 367. Almost everywhere the claimant must prove a definite interest and leave no uncertainty as to his share; and a general, indeterminate contribution creates no trust. *Olcott v. Bynum*, 17 Wall. (U. S.) 44. Yet, in a few cases, where the shares were undefined, they were presumed to be equal. *Edwards v. Edwards*, 39 Pa. St. 369. Even if the amounts had been ascertainable in the present case, no other result should have been reached, since, as between husband and wife, the doctrine does not apply, and the legal conveyance to the wife is deemed an advancement unless there be satisfactory evidence of a contrary intention. See *Adlard v. Adlard*, 65 Ill. 212.

WILLS — EXECUTION — ATTESTING WITNESSES: HUSBAND OR WIFE OF LEGATEE AS WITNESS. — This action was brought by the heir at law to contest a will on the ground that the husband of one of the legatees was a subscribing witness thereto. *Held*, that such relationship does not disqualify the husband from being a subscribing witness. *Lanning v. Gay*, 78 Pac. Rep. 810 (Kan.).

Where a devise or bequest is made to either husband or wife of an attesting witness, by the decided weight of authority such witness is thereby disqualified. *Sullivan v. Sullivan*, 106 Mass. 474. In arriving at this conclusion courts are guided by the consideration that such witnesses are incompetent on account of personal interest, and that a husband and wife cannot ordinarily testify for or against each other. In some jurisdictions, however, where bequests to subscribing witnesses are void by statute, a strained interpretation makes a bequest to the husband or wife of such a witness invalid, thus rendering the witness competent by removing the objectionable element of interest. *Jackson, ex dem. Beach v. Durland*, 2 Johns. Cas. (N. Y.) 313. In a few jurisdictions where a husband and wife are permitted by statute to testify for or against each other, the interest of either party in a bequest to the other is considered too remote to disqualify him or her as an attesting witness. *Lippincott v. Wikoff*, 54 N. J. Eq. 107. The principal case, which apparently holds the whole will valid, seems to have gone farther than any previous one in arriving at this result without statutory aid.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

WAR RISKS IN MARINE INSURANCE. — This subject, which since the breaking out of the Russo-Japanese war has naturally been of special interest, is considered in recent article by a French writer. *De quelques questions relatives à l'assurance des risques de guerre*, by Emile Audouin, 31 J. du Droit Internat. Privé 1025 (Nos. XI.-XII., 1904). It was formerly the practice, he says, for the same policy to cover both ordinary perils of the sea and war risks, for a single premium. But gradually a change was made, until in 1900 the principal marine insurance companies operating in Europe adopted the principle of a special policy for each kind of risk.

The change makes necessary an exactness in the legal definition of ordinary and war risks not required before. If the insured has to cover the two in different companies, it is important for him to see that there are no gaps to leave him without protection, as will happen if the war risk contract is held not to cover a loss, which the law governing the ordinary risk contract would not consider the result of an ordinary peril. If he can sue on both policies in the same country, there is little danger that the decisions will not supplement each other. But one who insures in France against ordinary perils and in England against war risks, may find the difference between English and Continental jurisprudence a grave matter. England determines whether a loss is caused by war by what seems to the Continental mind a very narrow principle, that of proximate cause. An example is the holding that the insurers against ordinary risks are liable for the loss of a vessel which went ashore because the Confederates had extinguished the light on Cape Hatteras. The immediate cause of the loss was the striking on the reef, not the act of war. And in the Spanish-American war the United States vessel *Columbia*, cruising at night without lights in conformity with orders, struck and sank a British vessel. The French court held the war risk insurer responsible, but Douglas Owen, an English authority, declares an English court would have held differently, for the war had nothing directly to do with the loss; a war vessel without lights might have done the same damage in maneuvers in time of peace. M. Audouin summarizes the English view as holding the risk an ordinary one, unless there is a direct act of hostility against the object insured. The more liberal Continental view is that if it can reasonably be said that the loss would not have happened except for the war, the war

risk insurers are liable, although the immediate cause was stranding or collision. An explanation, if not a justification, of the English view, the writer finds in the fact that the separation of the two risks in England was made piecemeal, while on the Continent it was made complete at once. In England first the clause "free from capture, seizure, and detention," was introduced. This exception was, in accordance with contract law, narrowly construed, and damage caused in an attempt to avoid capture was held to be covered by the policy. Now the excepting clause has been enlarged so as to include attempts at seizure and all consequences of popular uprisings and operations of war, and special war risk policies stipulate to cover all risks included in the clause. But, with what seems to the French writer excessive respect for precedent, the English courts have maintained their narrow interpretation, and he thinks the rule so well settled that it will be long before there is any change.

ANTICIPATORY BREACH. — In a late article upon this subject, the writer, while disclaiming any effort to justify in theory the general rule allowing recovery by one party before the time of performance, on repudiation by the other, discusses the grounds on which that doctrine seems to rest. *The Doctrine of Anticipatory Breach*, by Colin P. Campbell, 60 Cent. L. J. 64 (Jan. 27, 1905). He points out that these decisions have been based on two different views of the situation. The first, which is illustrated in *Hochster v. De la Tour* (2 E. & B. 678) is that the action is based on an implied undertaking in the original contract, to do nothing inconsistent with the contractual relation before the time of performance. This he attacks on two grounds, — the general one applicable to any theory justifying anticipatory breach, that the doctrine does not seem to extend to commercial paper; and the particular objection, that the damages recovered must be very slight, representing only the breach of the implied contract, since the contract to perform is still unbroken. The latter argument is hardly valid, since in all contracts involving several promises to be performed at different times, a breach of the first, if it would naturally lead to the abandonment of the others, is sufficient foundation for a recovery of damages based on a breach of all the obligations, though the time for the performance of some has not yet arrived. "This is law where the doctrine of *Hochster v. De la Tour* is denied, as well as where it is admitted." See 14 HARV. L. REV. 435 and cases cited. The main difficulty with the explanation based on the implied promise is the difficulty of finding the promise, and the fact that, in cases where the parties, after repudiation, decide to go on and complete, no action, even for nominal damages, seems ever to have been allowed for the breach of such an implied obligation.

As the real ground of the decisions, the author elaborates the view suggested in *Johnstone v. Milling* (16 Q. B. D. 460), that the repudiation by one party amounts to an offer of rescission, which, when accepted by action thereon by the other, makes a binding contract rescinding the old, in which new contract the law will imply a promise on the part of the one in default, to pay all damages resulting from the destruction of the original agreement. If there were such rescission, it would certainly prevent recovery on the ground first set forth, since the implied promise, if it ever existed, would then be superseded, but it is perhaps difficult to see an offer and acceptance in the repudiation and action upon it. Nor does the view furnish a satisfactory explanation of the decisions. Action has uniformly been brought, and recovery had, on the original contract, not on a second one, so that we have no precedent for implying any obligation in the contract for rescission. It may be contended that the declaration in such a case contains facts which the courts will construe into two contracts, allowing recovery on the second. But it is difficult to see how, in a case where bringing the action is the sole act which could be construed as an acceptance, the declaration which alleges only the repudiation by the defendant sets forth any second contract. The article is interesting and well argued, but the new explanation seems to be more involved than the old, and to rest on no firmer foundation. See 14 HARV. L. REV. 428 *et seq.*

Is "INTERNATIONAL LAW" LAW? — Austin's definition of law, as a command imposed by a sovereign and enforced by a physical sanction, sharply conflicts with common usage of the term "international law," and has evoked frequent criticism from writers in that branch of jurisprudence. Judged by Austin's standard, the rules of international law are no more than principles of positive morality. That they do not possess all the characteristics common to the laws of an organized political community, which Austin had in mind in framing his definition, is generally admitted. The dispute is as to whether the lack of certain of such requirements, notably that of enforceability, excludes them from the technical conception of law. A very readable discussion of the general problems is contained in a recent article in the *Columbia Law Review*. *The Legal Nature of International Law*, by George B. Scott, 5 *Columbia L. Rev.* 124 (Feb. 1905).

The writer maintains two propositions: first, that the quality of enforceability and the existence of a sanction are not essential to the definition of law; secondly, that assuming a sanction to be requisite, one is present in the realm of international law. Where a dispute between the citizens of two different nations results in litigation in the courts of one of them, it has been the practice of common law courts for two centuries, as the writer points out, to adopt and enforce the principles of private international law. Here a sanction, in the strict sense of the analytical jurist, secures the enforcement of the rules of international law, and the terms of Austin's definition are exactly complied with. The real difficulty, however, arises in considering the rules governing disputes the parties to which are not citizens but nations. Obedience to these rules, the writer contends, is compelled by a twofold sanction, international public opinion and war.

The writer's contention that a sanction is not essential to the conception of law is in accord with the well-known doctrines of the historical school of jurisprudence. But the suggestion contained in his second proposition that a sanction may be found in the forces of public opinion and war seems open to serious objection. The sense in which he uses the word "sanction" in this connection is totally at variance with its technical legal signification. The sanction of public opinion, if such there be, attaches equally to principles of purely moral obligation; to identify such a sanction with the sanction of law is to sacrifice the distinction between positive law and ideal morality. War as a sanction is analogous to the act of an individual in a community in enforcing his rights by brute force. The determination of right becomes a balance of national strength. Professor Scott's proposition leads to the remarkable result that until the group of nations unite in recognizing a duty of obedience to some determinate authority, the efficiency of the sanction is directly proportionate to the probability of wars and the weakness of culprit nations. Clearness in the conception of law is perhaps best secured by insisting upon the necessity of a sanction in Austin's sense, or by rejecting the notion of a sanction altogether as a non-essential attribute.

- ABUSE OF NEW TRIALS, THE. *Everett P. Wheeler*. 3 *Mich. L. Rev.* 257.
- ACT OF CONGRESS PERMITTING SUITS AGAINST FEDERAL RECEIVERS, THE. — INJUNCTIONS FROM STATE COURTS. *W. A. Coutts*. Maintaining that injunctions from state courts should be allowed on the ground that otherwise the Act would be negative and receivers would be given autocratic power. 39 *Am. L. Rev.* 59.
- CHIEF JUSTICE MARSHALL ON FEDERAL REGULATION OF INTERSTATE CARRIERS. *E. Parmelee Prentice*. Discussing *Gibbons v. Ogden*, 9 *Wheat.* (U. S.) 1 and tracing the development of, and limitations upon, the doctrines there laid down. 5 *Columbia L. Rev.* 77.
- CIVIL PROCEDURE IN INDIA. *J. H. Bakewell*. An exposition of definite evils in legal practice and procedure in India and an adverse criticism of a draft bill under consideration for their reform. 21 *L. Quar. Rev.* 55.
- CONSTITUTIONAL POWERS OF THE PRESIDENT, THE. *Charles A. Gardiner*. 28 *N. J. L. J.* 41.
- COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY. I., II. *Anon.* 49 *Sol. J.* 214, 232.

- DISSENTING OPINIONS. *V. H. Roberts*. An argument in support of the practice of reporting them. 39 Am. L. Rev. 23.
- DOCTRINE OF ANTICIPATORY BREACH, THE. *Colin P. Campbell*. 60 Cent. L. J. 64. See *supra*.
- DOCTRINE OF LIS PENDENS AS APPLIED IN INDIA, AND ITS APPLICATION TO SALES IN EXECUTION OF DECREES, THE. I. *Abdul Karim Khan*. Indicating divergence of Indian law at several points from that of English courts. 2 Allahabad L. J. 1.
- EFFECT OF TIME IN BARRING CLAIMS IN EQUITY, THE. *Anon.* Sketching, in a broad way, the English law upon the subject with a brief summary in conclusion. 49 Sol. J. 181, 201, 215, 233.
- EVIDENCE TO PROVE NEGLIGENCE OF MASTER IN EMPLOYING INCOMPETENT OR UNFIT SERVANTS. *Seymour D. Thompson*. 60 Cent. L. J. 104.
- EXEMPTIONS OF PROPERTY FROM MUNICIPAL TAXATION. *Eugene McQuillin*. Contains good collection of authorities. 60 Cent. L. J. 43.
- FEDERAL CONTROL OF INSURANCE CORPORATIONS. *William R. Vance*. Giving arguments for and against and concluding that federal control is neither desirable nor constitutional. 18 Green Bag 83.
- FEDERAL LICENSE OR NATIONAL INCORPORATION. *Horace L. Wilgus*. Reviewing Commissioner Garfield's Report on corporations engaged in interstate commerce; approving many features, but disagreeing with its conclusion in favor of a Federal License plan. 3 Mich. L. Rev. 264.
- HISTORICAL DEVELOPMENT OF THE LAW, OF THE. *George H. Smith*. A survey of the chief ancient systems of law, their influence upon Anglo-American law, and the basic principles of all law. 38 Am. L. Rev. 801.
- JUDICIAL NOTICE. *William Trickett*. Discussing the general subject with Pennsylvania citations. 9 Dickinson Forum 67.
- LEGAL NATURE OF INTERNATIONAL LAW, THE. *James B. Scott*. 5 Columbia L. Rev. 124. See *supra*.
- LIABILITY OF DEPOSIT COMPANIES. *E. Fabre Surveyer*. 4 Can. L. Rev. 37.
- MARRIED WOMEN'S PROPERTY LAW IN ONTARIO. II-VI. *Geo. S. Holmsted*. 25 Can. L. T. 53.
- NATURAL LAW. *Albert S. Thayer*. A metaphysical discussion purporting to show the basis of all law, ideals, and morality to be habits and customs of the community. 21 L. Quar. Rev. 60.
- NEW PATENT LAW OF MEXICO, THE. *Edwin Maxey*. 39 Am. L. Rev. 32.
- OLD LAW OF REAL PROPERTY AS MODIFIED IN THIS COUNTRY, THE. *George H. Smith*. "A commentary on Blackstone's exposition of the doctrine of real property, with a view of showing its relation to the existing law" in this country. 39 Am. Law Rev. 1.
- PRACTICAL SUGGESTIONS ON CODIFYING THE LAW OF WAREHOUSE RECEIPTS. *Francis B. James*. 3 Mich. L. Rev. 282.
- QUESTIONS RELATIVES A L'ASSURANCE DES RISQUES DE GUERRE, DE QUELQUES. *Emile Audouin*. 31 J. du Droit Internat. Privé 1025. See *supra*.
- REMOVAL OF PUBLIC OFFICERS FROM OFFICE FOR CAUSE. I. *Alonso H. Tuthill*. Considering the extent of the power of removal in the executive under various statutes and the right of office-holders to a hearing before removal. 3 Mich. L. Rev. 290.
- REPAIR OF FOOTPATHS AND STILES, THE. *Anon.* Discussing upon whom the duty to repair rests. 69 Just. P. 3, 15.
- RIGHT OF PRIVACY, AND ITS RELATION TO THE LAW OF LIBEL, THE. *Elbridge L. Adams*. Pointing out that there is no common law right of privacy. 39 Am. L. Rev. 37.
- RIGHTS OF A MESNE ATTACHING CREDITOR IN PROBATE PROCEEDINGS IN MASSACHUSETTS, THE. *Joseph M. Sullivan*. 67 Alb. L. J. 10.
- RULE AGAINST PERPETUITIES, THE. *Anon.* A brief review of the authorities. 27 L. Stud. J. 28.
- RUSSIAN RAIDS ON NEUTRAL COMMERCE. *Edwin Maxey*. A discussion of the question whether foodstuffs are contraband of war. 21 L. Quar. Rev. 35.
- SHOULD THE MOTIVE OF THE DEFENDANT AFFECT THE QUESTION OF HIS LIABILITY?—THE ANSWER OF ONE CLASS OF TRADE AND LABOR CASES. *Wm. Draper Lewis*. Analyzing the various decisions in the labor union cases and suggesting that motive should not affect the result. 5 Columbia L. Rev. 107.
- STATE CORPORATION AS A PARTY IN FEDERAL COURTS, THE. *Francis E. Baker*. 13 Am. Law 7.
- VALIDITY AND EFFECT OF STATE LAWS GIVING LIENS ON BOATS AND VESSELS. *John T. Marshall*. A short article collecting the authorities. 60 Cent. L. J. 86.

II. BOOK REVIEWS.

A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, including the statutes and judicial decisions of all jurisdictions of the United States. By John Henry Wigmore. In four volumes. Boston: Little, Brown and Company. 1904-5. pp. lv, 1-1002; xxi, 1003-1974; xv, 1975-3184; xiii, 3185-3921. 4to.

This is unquestionably one of the most important treatises on a legal subject published during the last generation. Professor Wigmore's long study of the subject of evidence, both its history and its present state, has borne good fruit in the monumental treatise he has prepared. It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written.

The patience with which the material has been collected, the fullness and completeness of the treatment, the exhaustive citation of authority, and the wealth of illustration and apt quotation are wonderful. Not only has Professor Wigmore collected here all the decisions of common law courts on the subject of evidence, but he has also collected the statutes of England and of the United States; a far more difficult task than the collection of decided cases. So thoroughly has the work been done that these volumes, in addition to their other merits, will serve as a source book for future investigators of this branch of law.

So important a book cannot be dismissed with a short review. To enumerate its merits alone would require more space than can be afforded. It was crowned by anticipation in the bestowal of the Ames prize two years before its publication. It has been long expected by legal scholars who have followed with interest Professor Wigmore's historical essays, and it has the rather mournful distinction of being perhaps the only monument which we shall have on so considerable a scale of Professor Thayer's studies in evidence. That Professor Wigmore owes a great debt to his distinguished teacher, he himself is the first to admit; and his graceful dedication, in which he joins Professor Thayer with Judge Doe, as "two masters in the law of evidence," emphasizes the indebtedness. Most of Professor Thayer's pupils would probably place him before Judge Doe in such a dedication.

Professor Wigmore has hit upon one great improvement in lawbook-making, which should be mentioned at the outset. In his notes he has not only collected great numbers of cases, supporting the propositions of his text, but he has stated in half a line the distinguishing facts of the case in such a way that a lawyer searching the notes for authority may know at a glance which cases are worth his examination.

The author's analysis of the subject is most exhaustive. It has all the distinctive characteristics of the author; patience, thoroughness, minute attention to detail, and the novelty of arrangement which a strong and original mind alone can give. The analysis is so original that it is worth giving in full.

BOOK I. What Facts may be presented as Evidence (Admissibility).

Part I. Relevancy.

Title I. Circumstantial Evidence (divided into fourteen topics, each dealing with evidence introduced to prove some human act, quality or condition or some fact of nature).

Title II. Testimonial evidence (divided into thirteen topics, dealing with the qualifications, impeachment, and rehabilitation of witnesses).

Title III. Autoptic Preference (Real Evidence).

Part II. Rules of auxiliary probative value.

Title I. Preferential rules.

Sub-Title I. Production of documentary originals.

Sub-Title II. Rules of testimonial preference.

Title II. Analytic rules: The Hearsay Rule.

Sub-Title I. The Hearsay Rule satisfied.

Topic I. By cross-examination.

Topic II. By confrontation.

- Sub-Title II. Exceptions to the Hearsay Rule (here are discussed in fourteen topics the ordinary exceptions).
- Sub-Title III. Hearsay Rule not applicable (Verbal acts, *res gestae*, etc.).
- Sub-Title IV. Hearsay Rule as applicable to court officers (Jurors, judge, counsel, interpreter).
- Title III. Prophylactic rules (*i. e.* the devices, such as oath and publicity of trial, by which the attempt is made to secure truth of the testimony).
- Title IV. Simplificative rules.
 - Sub-Title I. Order of presenting evidence.
 - Sub-Title II. Rules of exclusion for confusion of issues, unfair prejudice, or undue weight.
 - Sub-Title III. Opinion rule.
- Title V. Quantitative rules.
 - Sub-Title I. Number of witnesses required.
 - Sub-Title II. Kinds of witnesses required.
 - Sub-Title III. Verbal completeness.
 - Sub-Title IV. Authentication of documents.
- Part III. Rules of extrinsic policy.
 - Title I. Rules of absolute exclusion.
 - Title II. Rules of optional exclusion (Privilege).
- Part IV. Parol evidence rule (Constitution of legal acts).
- BOOK II. By whom evidence must be presented (Burden of proof: Presumption).
- BOOK III. To whom evidence must be presented (Law and fact; judge and jury).
- BOOK IV. Of what propositions no evidence need be presented.
 - Title I. Judicial notice.
 - Title II. Judicial admissions.

Every principal division is prefaced by an historical or theoretical introduction. Such a method of analyzing and developing the subject is a most admirable one, and future writers of legal treatises will be under great obligation to Professor Wigmore for the care with which he has worked out his plan. With a full index (which completes the work) it is easy to find not only the authorities on any special point, but the connection of that point with other parts of the subject; the historical and philosophical considerations which bear on its decision; and such practical arguments as the author after many years' careful study of the subject has been able to bring to bear on the solution.

For greatness of conception and patience of execution, for complete collection of authority, and for fullness and vividness of treatment, this treatise cannot be too warmly commended; but, unfortunately, some of the very things which contribute to its excellence have also led to certain regrettable defects that cannot be passed over in silence. Some of these defects are of mere detail, but some of them, on the other hand, are absolutely fundamental; and it is to be feared will prevent the work being as useful in practice as it must be to the teacher and the student.

Perhaps the most important of these defects is apparent from the very analysis of the subject copied above. This analysis is careful, original, and thoughtful; but it is new and strange, and probably would not help a lawyer in practice in his attempt to find the authority bearing upon a particular question at hand. The reviewer must speak on this matter with some hesitation, because use alone can be the final test. To lawyers trained as students in this analysis it may be entirely feasible, but to the present generation of lawyers, to whom it is novel, it may be simply repellent.

For instance, it does not seem possible that the author is either right or wise in bringing together as complementary subjects the titles of his first book, on Relevancy. Title I, on Circumstantial Evidence, is really a discussion of the general rules of admissibility; Title II, on Testimonial Evidence, contains the matter usually grouped in a chapter or chapters upon witnesses and methods of examination; while Title III, on Autoptic Preference, discusses the subject usually known as real evidence. To an ordinary lawyer it seems a little strange to regard these three seemingly unrelated subjects as together making up one great branch of the law of evidence. Originality is well enough, but to accomplish anything originality should be accompanied by sound judgment.

It is very likely that the author's subdivision of the subject was helpful to him in his enormous task of classifying the many thousands of cases with which he was forced to deal, but a classification which is based neither on historical nor on philosophical reason, nor on established use, should not appear in the published book; like the builder's scaffolding, every trace of it should be removed before the public is admitted to the finished edifice.

Not only the analysis but the nomenclature is novel. In place of well-known terms, to which we are accustomed, Professor Wigmore presents us with such marvels as retrospectant evidence, prophylactic rules, viatorial privilege, integration of legal acts, autoptic proference, and other no less striking inventions. It is safe to say that no one man, however great, could introduce into the law three such extravagantly novel terms, and Professor Wigmore proposes a dozen. Some of these terms have an unintentionally humorous effect; "autoptic proference" suggests to an ordinary man who has forgotten his Greek, the evidence of a physician before a coroner's jury, rather than such real exhibits as may be presented in evidence at a trial. "Prophylactic rules" suggest the printed directions which accompany a patent tooth-brush.

A few of his new terms he had already used in his notes in the last edition of *Greenleaf*, and their use there met with such a chorus of objection that he has thought it necessary in this work to justify their use; his justification, however, cannot be regarded as a happy one. To use the phrase "autoptic proference" instead of real evidence may be of great assistance to the author in sorting his cases and in formulating his text, but it is of no conceivable use to any lawyer who has occasion to consult the book.

When we come to the subject-matter we find it admirable in every way. The historical discussions are illuminating, the statement of doctrine is clear and sufficiently precise, and the argument is always enlightening and usually convincing. To select any particular portion of the text for special praise is almost impossible, so uniform is the merit of the work. Whether the author treats (in several parts, as a result of the peculiarity of his analysis) documentary evidence, or the privilege of witnesses, or the hearsay rule, he is uniformly happy in his treatment. His emphasis on the necessity of cross-examination as the basis of the hearsay rule is not quite orthodox, but it is probably correct, logically and historically.

The author has drawn his illustrative quotations from many sources with great advantage. It sometimes looks a little remarkable to see a long passage from Burke, or from Professor Sedgwick's philosophical work, cheek by jowl with a passage from an opinion of Baron Parke or Judge Doe; but no lawyer would be any the worse for an excursus into the realms of philosophy or polite literature. Space has been taken for rather long discussions on somewhat unrelated subjects; such as the propriety of granting a new trial where an error has been made in the admission or the exclusion of evidence. It might have been better in some cases (as in the example just stated) if Professor Wigmore had expressed himself a little less positively in a matter outside the strict scope of his work; for his views are, to say the least, questionable.

In spite of its imperfections, this is, and must long remain, the best treatise on the common law of evidence. Lawyers must learn to overlook the peculiarities of nomenclature; students must be content to accept the analysis as a convenient division of a vast material: for we have here what we have never had before, and are unlikely to have again, at least in this generation; a complete and accurate presentation of the principles and of the authorities of the law of evidence.

J. H. B.

THE LAW OF FOREIGN CORPORATIONS and Taxation of Corporations, both Foreign and Domestic. By Joseph Henry Beale, Jr. Boston: William J. Nagel. 1904. pp. xxvi, 1149. 8vo.

Some years ago, recognizing the growing need of a practical text-book upon these topics, Professor Beale began the present volume. Unfortunately its publication has been delayed until now. In the meantime, however, the great

increase in the number and importance of corporations, doing an interstate business, or conducting their affairs entirely beyond the borders of the incorporating state, has made this subject of pre-eminent importance. By adding considerable new material to the careful fundamental work that had previously been done, and making a thorough collection of cases, the writer has now produced a most welcome and timely treatise.

The first general title of the volume is devoted to a general consideration of the nature and the powers of corporations, with particular reference to the jurisdiction by the laws of which they exist. This involves a discussion of the domicile, the residence, and the citizenship of corporations, topics that have often been the subject of considerable confusion. One chapter of this title summarizes the statutes for the formation of corporations of all the States, Great Britain, and the Canadian Provinces. The following titles then consider in detail the rights and powers of a corporation in acting beyond the boundaries of the state which created it. The extent to which it may thus act, its constitutional rights when so acting, the conditions that may be and are imposed upon it by the foreign state, and the status of the foreign corporation in litigation both as plaintiff and as defendant are all very fully and lucidly treated. In the discussion of the jurisdiction of the foreign state over the internal affairs of a corporation, the vexed question of the enforcement of stockholders' and directors' statutory liability outside of the state which imposes that liability is considered with especial thoroughness. This chapter gives the subject a much more adequate treatment than the reviewer has been able to find in any other text-book.

A considerable space has been devoted by the author to the main sub-topic of the book, namely, Taxation of Corporations. This portion of the work includes domestic as well as foreign corporations. In fact, in many ways its title might be taxation in general. The difficult matter of *situs* for the purpose of taxation is made the basis of the discussion, and the general principles of taxation are thus developed and then applied to the many varied forms which corporate taxation assumes in the different states, both with reference to the different variety of taxes, and the different classes of corporations that are taxed. This portion of the volume includes a summary of the corporation taxes imposed by the different states. The work concludes with a discussion of corporations created by the laws of two states, and the receivership, insolvency, and dissolution of foreign corporations. Reference has already been made to some of the digests of the statutory provision of the States and the British Provinces that appear in the book. There are numerous others upon important matters of corporate regulation. This feature greatly adds to the practical value of the volume in the hands of the investor and the incorporator.

To the foregoing inadequate summary it is only necessary to add that the author has approached his task with scholarly discrimination, and with the end of practical utility always in view. Few, if any, other treatises deal satisfactorily with this subject, and there is thus a real demand for just such a book. It has been kept quite strictly confined within the proper scope of its title, and there it has been thorough. It ought, therefore, within its field to aid in a considerable degree in clarifying the law.

W. H. H.

HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS.

By Robert M. Hughes. St. Paul, Minn.: West Publishing Co. 1904.
pp. xviii, 634. 8vo.

Especially to the student and young practitioner this, the latest of the familiar Hornbook Series, should be welcome. Before its publication, the most valuable treatise on federal procedure was admittedly that of Mr. Foster. But in his two cumbrous volumes, as in other works that go into greater detail, the reader finds it difficult to extricate the purely adjective law of procedure from the mass of substantive law under which it is hidden. The plethora of legal information which Mr. Foster's book contains impairs its usefulness for

anything but reference purposes. Mr. Hughes, on the contrary, by eliminating all that does not strictly pertain to procedure, and by treating what remains in logical sequence and with some attention to literary style, has given us a very readable volume. It contains moreover much that Mr. Foster's book takes for granted, matters of ordinary routine that everybody is expected to know, but which the beginner frequently does not know,—for example, his treatment of how the federal courts are constituted, and what is the elementary procedure for getting a case before them. Since Judge Curtice's collection of lectures on the federal judiciary, there has been no clearer exposition of this particular subject.

Mr. Hughes's method of presentation is original and peculiarly fortunate. The practitioner who has made choice of a court in which to bring his action, has no curiosity about the practice of more than that one court. Mr. Hughes, after first helping him to make this choice, more effectually gratifies this restricted curiosity by treating each court of original jurisdiction separately. Repetition is avoided by grouping rules of general application, statutory and otherwise, in two short chapters. The same treatment of each court as a unit is adopted in tracing the case systematically to conclusion in the courts of last resort. It is strange that no previous writer has followed so logical a plan as this.

E. E. F.

A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS
Created under the "Business Corporation Acts" of the Several States and Territories of the United States. By Thomas Gold Frost. Boston: Little, Brown, and Company. 1905. pp. xlv, 622. 8vo.

The first part of Mr. Frost's book is devoted to a comparative study of incorporation law in the various states and territories of the United States. The comparison is made by taking each step of incorporation in order, and in this way the process of incorporation is also minutely described. The established principles of law are briefly stated, and the citations are to the leading cases only. Longer discussions are given to the more unsettled questions, such as the doctrine of *ultra vires*, the views as to collateral attack of corporate purposes and powers, and the different rules concerning payment for subscribed stock. The second part of the volume contains a synopsis-digest of the general incorporation acts, forms for drawing charters and for various clauses in the charter, and tables of comparison. The book as a whole presents in a practical manner many things which it is important to know, and it seems certain that it cannot fail to be of great service to the practitioner.

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AN EARLY DECISION ON INTERCOLONIAL • RIGHTS.

THE report of the case of Governor Bass *v.* The Earl of Bello-mont, Governor of New York, was found by me in preparing the case of the State of New Jersey in its boundary suit against the State of Delaware. As it has not been published elsewhere, its legal and historical interest seems to justify reproducing the bulk of it where it will be more accessible. It is the first discussion in a court of law of the constitutionality of a colonial statute, and Lord Holt, in considering this, applies the principle, "no taxation without representation," which was the basis of our revolution from England. It contains also a general consideration of intercolonial rights.

About the year 1700 a strong movement was on foot in England directed toward doing away with all proprietary governments in America. Such governments existed in East and West Jersey, Pennsylvania, and Maryland. On the other hand, a crown government was in charge of New York and set up pretensions over New Jersey, requiring outward-bound ships from there to touch at New York. This naturally produced a great outcry, with the result that Governor Bass of New Jersey persuaded the Earl of Bello-mont, Governor of New York, to try the claim by a feigned issue at Westminster Hall.

It is curious to see that the wishes of the many distinguished counsel in this case were not realized. The annals of the time show that the real point in controversy was whether New Jersey

had any rightful proprietary government. This question was raised in the case, but not decided. Yet Lord Holt's views, given perhaps *obiter*, that the Duke of York had no power or authority to divide his "particular franchise" of government of the whole tract, had a great moral effect upon the New Jersey Proprietors by convincing them that expediency required a surrender of their government to the Crown. This they accordingly made in the year 1702.

In the leading case of *Martin v. Waddell*,¹ where the charters and grants referred to in Lord Holt's decision are fully set out, Chief Justice Taney came to a conclusion directly opposite to Lord Holt, deciding that proprietary government was rightfully vested in the New Jersey Proprietors by the grants from the Duke of York.

It may also be observed that Lord Holt takes a view of the Crown's rights which the colonists have always most strenuously denied. He holds in effect that although the right of government might be granted by the Crown to proprietors, or to companies, yet it might be resumed by the Crown at will. This course was taken by King James II. in 1687, when Governor Andros was commissioned to be governor of all New England, including also New York and New Jersey, and by William and Mary in 1692, when Governor Fletcher was appointed to rule over New York and Pennsylvania, and although Maryland had been granted to Lord Baltimore as a proprietary province, it was actually ruled for many years by governors under commission from the Crown.

Chauncey G. Parker.

NEWARK, N. J.

JEREMIAH BASSE AND JOHN LOFTING PLTS.
RICHARD EARLE OF BELLAMONT DEFT.²

IN BANCO REGIS, MIDDS

10 May 1700.

In an action of Trover and Conversion of a Shipp called the Hester the Deft pleaded not guilty.

By Rule of Court it was to be admitted that the Deft. was Governor of New York with all its Dependancies.

That the seizure and Condemnation of the said Shipp & Cargoe were pursuant to an Act of Assembly of New York.

¹ 16 Pet. (U. S.) 369.

² See 12 Mod. 399; Holt K. B. 332. Parts of the report have been omitted.

That immediately upon the seizure of the said Shipp & Cargoe Restitucon thereof was offered the plts upon payment of ye Cus-
tomes payable by the said Act of Assembly.

And that the said Ship being Condemned was publickly sold by
Inch of Candle for 315 L New York money.

Then several Instruments were read viz.

A Grant made to the Duke of York.¹

The Act of the Assembly² of ye 24 Octob. 1692.

The Instructions to the Lord Bellamont.

Proclamacon put forth by ye Lord Bellamont.

LD. CHIEF JUST. HOLT. Now the question is onely whether
East Jersey is dependant of New York.

Then the plts Read an Indenture between the Duke of York and
the Earle of Perth and others by which the Duke Granted to them
New Jersey.³

And the Kings Declaracon in 1683⁴ Reciting the Grant to ye
Duke of York &c the Indenture of the Duke of 1682, whereby he
granted the province of East Jersey to the Earle of Perth and
others by which his Maty Declared his will and pleasure to be that
the Planters and other Inhabitants of East Jersey should yeild
Obedience to the Grantees their heirs and Assignes as absolute
Proprietors thereof.

Then some witnesses were examined as to the Antiquitys of ye
Assemblys of New York and East Jersey and touching the Gover-
nors of New York exercising or pretending to exercise A Jurisdic-
con in East Jersey.

And soe ye plts Councill left the matter till they should heare
what Answer was given to it.

LD. CH. JUST. HOLT. Well Mr. Attorney what do you say to it.

*Mr. Attor. Genll.*⁵ But however now my Lord we are upon a
Quæon of Law how far these Grantees can maintaine this accon
upon the notion of their being independant of New York. We
think there is no foundation at all for it They have Read the Let-
ters Patents in 1664 by which all this Tract as well East and West
Jersey as New York was granted as one intire tract of land and
Territory to ye Duke of York his heirs and Assignes. In that
Grant he hath great Powers and Authorities Granted to him the
Validity of which I shall not dispute at present but take notice of

¹ Mch. 12, 1664.

² Dated March 14, 1682-3.

³ Sir Thomas Trevor.

⁴ Of New York.

⁵ Nov. 23.

what is Granted there is a Power of Pardoning and appointing Commissrs etc. and Judges and expressly a Power of making Laws for all that tract of land.

Now my Lord here is a Legislative Power granted to the Duke; Now this extends to the whole tract, to the whole territory as well East Jersey as New York for at that time they were undivided. It does not give him any power to devide the Legislative Authority but if he had kept it in his own hands he must have executed it as one Authority throughout the whole and could not have divided it by erecting several Independant Assemblys and Establishing severall Independant Jurisdic̃ons. It was never intended when the Crowne granted such an intire tract but that there should be kept one Intire Jurisdic̃on for the preservãon of the whole for when tis Divided one part grows too weake for the other And quarrells arise and every one Considers his owne private interest and the Publick is neglected Soe that tis not agreeable to the Words or intent of this Charter that this which was granted as one Intire Jurisdic̃on should be executed seperately and this the rather appeares by the words that Confirme them to make their Laws as neare as might be to the Laws and Statutes of England where there is but one intire Legislative Power.

They claime by a grant from the Duke of York as they are his Assignees of part of this territory granted to him with these Authorityes. Say they, wee by this Grant from the Duke have the same Jurisdic̃on (they cant prtend no more) as they had from the Crowne soe that my Lord if he himselfe could not have exercised this Jurisdic̃on independant in severall parts of this territory then certainly if they had it granted to them expressly it would be voyd Now he hath granted noe such thing the Grant that was read is in 1682 and that Recites a former grant in 1664. I do not see that the grant recited will give them any such authority. For there is not a word in it of any power or authority of governing. Soe that my Lord in 1664 for what appeares there is nothing granted but such a Division of Land for them to plant but still subject to the Authority vested in the Duke of York by Leters Patents. Soe that till the yeare 1682, it does not appeare that they had any Authority for the Administrãon of the Government. Yet I believe they might take upon them such a Power and did call Assemblyes but tis plaine they had no Right to do it by this Grant of 1664 for no body will say that by the Grant of the Land this Royall Authority did pass. It would not pass as incident to

the Land tho' I think one of the Councill said soe but that cannot pass sure by Implicaçõ for one man may have the Land and another the Authority espetially Royall Jurisdicõ. If the King grant away any Land that wont pass any Royal Authority nor no Royall Franchise unless it be expressly Granted. Then we come to the grant of 1682.¹ And that will not goe much further. It is plaine when this Jurisdicõ was Granted to the Duke It was not thought that the Legislative Power passed by Implecaçõ or Generall words of Government or Authority or Royall Franchise but the same was particularly named the Charter Grants him the Power of Governing and making Laws and afterwards for him to Confirme and alter them soe that it was thought necessary that should be named particularly Now see how it is mençoned in the Grant from the Duke under wch they Claime thereafter the Lands are Granted and all Bays Rivers and waters &c. It says all Royalties Franchises and Appurtences whatsoever to ye same belonging or in any wise a^ppeyning. There are all ye words in this Grant from the Duke of York. Now my Lord with Submission this cannot passe the Legislative Power in a Grant. Here is nothing but the Ordinary Power of Government which is the Administration. But my Lord what Wee insist upon that if in Expresse words it had been Granted by ye Duke it could not by Law be granted allowing the King had well granted this Legislative power we say he could not Assigne it over to another he might Assigne the Land and give them ordinary Jurisdicõ which is done by Officers but the Legislative Power is of soe high a nature that tho' it be granted to him and his Assignes 'tis not Assignable.

If the Crowne should direct County Palatines within such a Circuit I don't think the Grantee could make three County Palatines of it though it was Granted to any man and his Assignes he could not divide it into severall Independent Jurisdicõs but he must enjoy it according to his Grant as one Intire Jurisdicõ within such a Circuit of Ground.

My Lord this is a matter of great Consequence to the Crowne for these Plantaçõs if Independant on New York will pay no Duty. If they can get a great deale of money in a little time they won't care what becomes of the Plantaçõs afterwards and New York will be disabled to preserve the whole. I hope there is no foundaçõ in law for it.

¹ See n. 3, page 485.

*Mr. Soll. Genll.*¹ I will admit at present that the Grant made to the Duke with a Power to Governe by such Laws as he should think fitt and to make Laws to be good as it is a Grant to him his heires and assignes But this Construc̃on is ill placed to understand it that they must be the Assignes of the Power who are the Assignes of the Lands that King Charles the 2d Granted it would be hard to think that the word Assignes should carry the Assignment of the Power itselfe. It was a Confidence that the King had in the Duke and his heires but perhaps he might not have had that Confidence in his Assignes. That would be insuperably hard to carry it soe far much more to carry it to the Assignes of this Land Granted to the Duke of York. At that rate not onely these persons that claime under the Earle of Perth and others and the Assignes of other Lands had this Power Exclusive of the Duke and his Assignes but even every particular Planter under them may pretend to have the same Power.

Now my Lord tis true phaps they had Assemblys before that of New York and if they had no Assemblys since this Revolũon the King might Grant them A Power to make Assemblys but certainly themselves cant set them up, Soe that whatever the Practise hath beene that wont give an Interpretac̃on of a Grant made within the time of memory and nothing of practise can Confirme to them a Power that was not Assigned and since that the Governors from the King have exercised Acts of Power under the Commission that hath been granted to them and before that time tho' there have beene no Assemblys wee have Evidence on our side to that purpose both of Governors made by the Duke and his present Maty but I think this Question depends upon matter of Law upon the Grant.

Mr. Sergt. Darnell. Yes my Lord wee shall offer some Evidence that I think may be of use in this Case.

LORD CH. JUST. HOLT. I wont hinder you but I would speake as to the Right because Mr. Attorney insisted on matter of Law. Ile tell you what occurs to me in this matter. You say that such an Assembly or Legislative Power cannot be set up by the People of East Jersey how came you to set up a Legislative Authority at New York for it appeares upon the Evidence if that be true that Sr Edmund Andrews Governed by himselfe and a Councill at first and before my Lord Dungs time there was no Assembly at New York and he was the first that Established such Assemblys. Then

¹ Sir J. Hawles.

if he was the first that Establisht those Assemblys how comes it to pass that they must be for the whole Tract of land in the Dukes Patent.

The next thing is this Supposing as you say it be true that this Authority and Power of Governmt and making of Laws cannot be divided you wont say that New Jersey is Excluded from having a right to send to those Assemblys then if the whole tract if the whole Land and Territory that is granted have an Equall right to be represented at the Generall Assembly how comes it to passe that those who are close at New York have a power over the rest and they are not summoned. Was this Act made for New York and not for the Dependants.

Mr. Attor. Genll. My Lord for the Dependants.

LD. CH. JUST HOLT. In the next place how comes this place to be dependt upon New York. They may as well say that New York is dependant on East Jersey there is noe superiority that appears to me.

Mr. Attor. Genll. Because it remained in the Duke and he having the Legislative Authority over the whole in effect the Assemblys there were for the whole And the Land Granted away were dependant on the Duke for their Laws.

LD. CH. JUST. But it did not depend upon New York. If he would have reserved it it might have been in his Power but do you think when he granted three quarters of the Territory away that he hath the Government over them in respect of what remains? No he hath the Governmt as a particular Franchise granted to him.

Mr. Sergt. Darnell. With submission they cannot pretend to any Government under the Crowne.

LD. CH. JUST. Perhaps they can't, how came you by it.

Mr. Sergt. Darnell. If this was in the Duke of York it is now in the Crowne.

LD. CHIEF JUST. What if it is.

Mr. Sergt. Darnell. If it did remaine in the Duke and is now come to the Crowne againe it must be agreed that the King is seized of this Government againe in Right of his Crowne and he exercise it over all this land.

LD. CH. JUSTICE. What do you infer from that.

Mr. Sergt. Darnell. Why then here is an Authority from the King to exercise this Power over New York and all its Dependancies within the first Grant.

LD. CH. JUST. How came it to be Dependant.

Mr. Cowper. Now my Lord we think the King hath Granted it intirely to my Lord Bellamont and that it is not severed. And that from the Generall words of Governor of New York and its Dependencys and what better way of Explaining them is there then by the practise and these were the words of ye former Patent.

Then Sr Edmund Andrews was called and Sworne.

Who gave an Account that he had A Commission from the Duke of York to be Governor and to receive the Country Granted to the Duke from the Dutch who had possessed themselves of it in the time of warr and were by the Peace to Restore it But when he was sent Governor of New York Carteret was sent Governor by the Proprietors to East Jersey And that upon a Complaint made to him against Mr. Carteret he did by Advise of his Councill Secure him and unite the Government of those Plantaçons to the Government of New York to which the Inhabitants did submit and was afterwards Justified in it.

Then an Entry was read out of the Councill Book of 14 August 1687 Setting forth that the Proprietors of New Jersey had by Petiçon of May 1687 Complained etc and desired the Customes might be received at New Perth.

Mr. Attor Genll. We have done my Lord.

Sr. Thomas Powrys. My Lord I will trouble you but a little this is a thing of great concerne to all the Plantaçons And there is no Inconvenience if you take it as we would have on our side for every one knows that their Laws are Controllable here.

As to what Mr. Attorney says It is Capable of an Answer for I take it where Countrys are unplanted and unsettled and no Law in Being if the King Grants it to the Duke with those Powers that are necessary for the Planting of the place I suppose if the Duke Grants over the whole to another I do not think but his Assignee would have the same Power Soe it would have been if the Duke had granted over the whole tract as it was Granted to him why then put the Duke out of the case and suppose a private subject had this Grant and then instead of granting the whole he grants away two thirds with words in this Grant which I am sure must pass the Powers or extinguish them as to him for here he grants a power to exercise all necessary Government whereby the premises might be the more improved and all Authority which by the Letters Patents are Granted to him.

Then if they set up such distinct Governments the Government

here might Controll them. Now this in the nature of the thing hath no Inconvenience here is a Concurrence of all partys the Duke Granted all that he could Grant the King next yeare does approve of that Grant and directs the People that they should observe the Orders of these Grantees which is a Concurrence of the King to this Grant and hath been followed ever since by the usage Now where is the Inconvenience As to the place that is now Planted and the Inhabitants there is noe Inconvenience all but however here is their great Argument all this while You have no Lawfull Authority but they are to make good their owne power and not say we want it And their own Act hath put an end to all this for this very Act shows it was onely made for the province of New York and what is dependt on it. The title may be may afford no great Argument which says tis for his Matys Province of New York and its Dependancies But here is an Act to divide this Province and its Dependancys into Shires and Countys and here they are enumerated Now if they had found East Jersey amongst them they had said something but they cant think this a Dependt within the Generall words.

Then the Title and begining of the Act for Dividing New York into Provinces was Read.

Sr. Bar. Shower. Here is one County of Orang and it begins from the Bounds of East and West Jersey soe tis plaine they are excluded.

LD. CH. JUST HOLT. Gent. of the Jury this Accon is brought by these two plts against my Lord Bellamont Governor of New York. And it is for seizing a Shipp that was the plts Ship and severall Goods the Shipp was freighted withall. It is Gentlemen Admitted that this Shipp was seized but the question is whether or No this seizure was a Lawfull seizure and there hath been made a good Justificacon by my Lord Bellamont and those by him employed.

In the first place you are to Consider the value of the Shipp.¹ But that which my Lord Bellamont Insists upon is this Says he I was Governor of New York there was An Act of the Assembly made there in nature of an Act of our Parliament in England and by that they lay a tax or Duty upon all Shippes that shall be outward bound and come into any Port or Harbour of New York or its Dependencys and in case of refusall the shipp was subjected to a seizure and for that reason says he the plts shipp being outward

¹ The Court then discussed the evidence on that point.

Laden at Perth Amboy and refusing to pay the Duty imposed by this Act this shipp was seized.

That there was such an Act and A Duty imposed and the plts Did refuse to pay it is without all question And for this reason the Shipp was seized but the matters insisted on on behalfe of the plts is this Say they tho' this is a very good Law and does bind New York and all the Country and Rivers that depend upon it yet it does not oblige any of the Inhabitants or any persons that Resort to New Jersey for that is noe Dependent on New York. To prove this they have shoud you in the first place that this is the north part of America in about 41 Degrees Latitude 'tis a large tract of Land that did extend to the North part of America and was granted 16 March 1663 to the Duke of York and then was granted to him his heires and Assignes the Government of this whole Tract and Territory. This it seemes since has been improved and divided into four severall parts that is to say New York East Jersey West Jersey and New Albany but say they there was a Grant made by the Duke of East Jersey and West Jersey to my Lord Berkeley and Sr George Carteret and their heires and a Patent was produced in 1674 reciting the former Letters Patent and the Conveyances by the Duke and say they is now severed from New York and tho' New York become to the Crowne yet say they ever since this Grant hath New Jersey been lookt upon as a Distinct Province and hath had a seperate Government and New York has never intermeddled with them but they have had Assemblys of their owne from tyme to time and having these Assemblys New York never intermeddled with them and they had Assemblys as one swore first that is to say in 1675 And New York had none till after Col Dungan came and he set up Assemblys at New York and say they no precedent can be produced before this Act of the Assembly of New York in 92 when the Government of New York have taken upon them to make Laws or exercise the Government in East Jersey and say they there was an Order of Councill in 83 whereby tis directed that these people at New Jersey should submit to those that were the Proprietors and such as they should appoint This was an order by the King countersigned by my Lord Sunderland and they say there was never any attempt upon them but once in the time of Sr Edmd Andros And he about the yeare 79 called Carteret who was Governor under the Proprietors to an Account and he deprived him of his Government and took the Government upon himselfe and did call Assemblys.

That he did look upon himselfe to have A Right soe to doe and was told he would be called to an Account if he did not call Carteret to an account for some misdemeanor whereof he was then accused and accordingly he did soe but when he called an Assembly then it seemes hee called it for New Jersey onely. Soe that say they this New Jersey has been always Lookt upon as Distinct from New York and not under ye Jurisdiçon or Government of New York and tho' Sr. Edmd Andros after that was called for home upon some other account yet that matter was settled as to Carteret and he was restored to his Governmt againe.

Well but notwithstanding all this says the Deft. this New Jersey is a Dependt on New York. how? Why thus when the Government of the whole Tract of Land was granted to the Duke in 74 tho' he does not Grant this New Jersey and West Jersey yet he cant splitt the Government that was at that tyme for he was but a subject And that would be Inconvenient for it would weaken the place and the Government would not be strong enough to defend itselfe and it may be It might be an Inconvenience when the King Grants a Tract of Land that the Proprietors should divide the Government but whether it can be soe or noe is not necessary at this time to Determine it hath been practised and let it remaine at present as it does but suppose it could not be why then say the Defts. Councill the whole Government remaines in the Duke and now that Right is emerged in the Crowne and the Government is in the King of England and then he having made a Governor of New York the consequence will be that he is Governor of this whole Tract of Land but I take it to be otherwise and doe not think because the King hath made him Governor of New York that it appears that the Kings intençon was that the Governor of New York should be Governor of New Albany or East or West Jersey I do think that if the King who may divide and Canton it out as he pleases if he Grant the Government of New York to one by vertue of that Grant he doth not Carry the Government of New Jersey nor Albany.

Then they go to another thing and say that New Jersey is Dependent upon New York but I dont pçeive they have given any Evidence of that the King might have made it soe he might have said who ever is Governor of New York shall be Governor of New Jersey this might have been soe but it does not appeare that any such thing was mençoned and therefore if he was never made soe he that is Governor of New York is soe onely and of noe other part

and then he hath no Power or Authority to make Laws for any other parts tis true the Law intended to bind New Jersey but if he had noe Authority to call such an Assembly tis a void Law and the persons that have acted under that Law must be Trespasers.

You have heard the Evidence a great deale more largely than is necessary for me to repeat to you it seemes tho' they pretend New Jersey is Dependant on New York the Government there has not been exercised as such the usage hath been otherwise and it hath been otherwise and it hath beene looked upon otherwise — And soe it hath beene lookt upon *and tho' it had noe legall rise* yet it was reputed among themselves A Government Distinct from New York I leave it to you upon the whole matter. If you are satisfyed that East Jersey is a Dependt upon New York then you are to find for the Deft. But if it be not dependent on New York then you ought to find for the plt.

(The jury found for the plaintiffs.)

DISTRIBUTION OF ASSETS OF BANKRUPT PARTNERSHIPS AND PARTNERS.

UNDER the Bankruptcy Law of 1898¹ the assets of bankrupt partnerships and partners are to be distributed as follows: "The net proceeds of the partnership property shall be appropriated to the partnership debts, and the net proceeds of the individual estates of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

If Congress desired a convenient method of distribution, this sub-section attains that end. Moreover, it has, when viewed without regard to the balance of the act of 1898, the sanction of time-honored precedent. The English bankruptcy legislation of 1883² and 1849³ and the United States acts of 1867⁴ and 1841⁵ contain sections almost identical in their application. In the English Bankruptcy Act of 1825⁶ we find: "And be it enacted, That in all Commissions against One or more of the Partners of a Firm any Creditor to whom the Bankrupt or Bankrupts is or are indebted, jointly with the other Partner or Partners of the said Firm, or any of them, shall be entitled to prove his Debt under such Commission for the Purpose only of voting in the choice of Assignees under such Commission, and of assenting to or dissenting from the Certificate of such Bankrupt or Bankrupts, or of either of such Purposes; but such Creditor shall not receive any Dividend out of the separate Estate of the Bankrupt or Bankrupts until all the separate Creditors shall have received the full Amount of their respective Debts, unless such Creditor shall be a Petitioning Creditor in a Commission against One Member of a Firm." This section, the statutory parent of more recent legislation, was itself

¹ § 5 f.

² St. 12 & 13 Vict. c. 106, § 140.

³ 5 Stat. L. 440, § 14.

⁴ St. 46 & 47 Vict. c. 52, § 40 (3).

⁵ 14 Stat. L. 517, § 36.

⁶ St. 6 Geo. IV. c. 16, § 62.

intended to be declaratory of the then existent law, as found in the chancery decisions. The doctrine which it espouses was first suggested in *Ex parte Crowder*, decided by Lord Harcourt in 1715.¹ In 1728 the suggestion was endorsed by Lord Chancellor King, who speaks of the rule as settled and characterizes it as a "resolution of convenience."² Lord Hardwicke adopted it without comment.³ Almost half a century later Lord Thurlow disapproved of it on principle and permitted the joint creditors to come in against the separate estate *pari passu* with the separate creditors.⁴ He was in turn overruled by Lord Loughborough in 1796. *Ex parte Elton*, which is cited as the overruling case, was one in which there were two funds, in one of which the joint creditors had a preference, and it was held that the joint creditors "must get as much as they can from that *first*."⁵ It will be noted that this decision merely enforced the well-recognized equitable principle of marshaling assets. This case was followed by one in which a joint creditor sought to participate in the separate estate of one of eight partners, there being no joint fund, and no proceedings against the other obligors. The Attorney-General argued the inconvenience of compelling the bankrupt's assignee to seek contribution from seven partners, not parties to the action, and cited *Ex parte Elton* in support of his position. Lord Loughborough extended the effect of his previous decision, and refused to permit the partnership creditors to share in the separate estate.⁶ Lord Eldon followed Loughborough merely because he thought it better "to follow the rule that he found established, than to let it be continually changing, so no one can tell how it is."⁷ In a review of the history of this rule, he took occasion to state that he had "often doubted whether it was the best in principle."⁸ The act of 1825 followed. It will be noted that the authority in support of this rule is based on convenience, and that the one Lord Chancellor who felt himself at liberty to act on principle, refused to adopt it. The influence of these decisions upon bankruptcy legislation has been "seed cast into time, which grows, and spreads, and

¹ 2 Vern. 706.

² *Ex parte Cook*, 2 P. Wms. 500.

³ *Ex parte Hunter*, 1 Ark. Just. 223, 228, 1742.

⁴ *Ex parte Cobham*, 1 Bro. C. C. 576, 1784; *Ex parte Hodgson*, 2 Bro. C. C. 5, 1785; *Ex parte Page*, 2 Bro. C. C. 119; *Ex parte Flintum*, 2 Bro. C. C. 120.

⁵ 3 Ves. 239.

⁶ *Ex parte Abell*, 4 Ves. 837.

⁷ *Ex parte Clay*, 6 Ves. 813, 1802; *accord*, *Ex parte Chandler*, 9 Ves. 35; *Ex parte Taitte*, 16 Ves. 193.

⁸ *Dutton v. Morrison*, 17 Ves. 193, 207, 208.

sows itself anew." It has impelled the majority of modern courts to adopt this method of distribution even in cases not governed by statute.¹

However idle this weight of authority might render any discussion of the underlying principles which should govern distribution where the English legal idea is accepted, it is submitted that this authority is of no force where a different theory of the nature of a partnership prevails. An examination of the act of 1898 will disclose a departure from previous bankruptcy legislation involving a radical change in the theory of the nature of a partnership. The act provides that the term "persons" shall include partnerships;² a partnership may be adjudged a bankrupt; the creditors of the partnership shall appoint the trustee, and the partnership estate shall so far as possible be administered as other estates; jurisdiction over one partner gives jurisdiction over the partnership; the partnership may prove against the individual estates and the individual estates against the partnership estate.³ In the earlier bankruptcy legislation of the United States, section 14 of the act of 1841 and section 36 of the act of 1867 provide that "*where two or more persons who are partners in trade are adjudged bankrupt*" the certificate of discharge shall be granted "*to each partner as the same would or ought to be if the proceedings had been against him alone.*" Under the old English practice it was necessary to take out simultaneously a joint commission against all the partners and also a separate commission against each. If for any reason a commission could not be maintained against one, a joint commission against the others could not be supported. In order to support a petition against a firm, each of the partners must have been proved to have committed an act of bankruptcy.⁴ Under the modern English practice a receiving order made against a firm will operate as if it were a receiving order against each partner; the adjudication is not against the firm in the firm's name, but against all the partners individually.⁵ These distinctions are more than verbal. They go to the essence of the nature of a partnership. Under no act other than that of 1898 could the bankruptcy of a partnership

¹ Bates on Partnership § 825, note, contains citations from 26 states in which this method of distribution has been adopted either under or in the absence of statutes. These cases seek some principle on which to rest, and many novel equities are discovered to meet the demand.

² Bankruptcy Law of 1898 § 1 (19).

⁴ Robson's Bankruptcy pp. 678, 679, 680.

³ Act of 1898 § 5.

⁵ Act of 1883 Rules 262, 264.

be adjudged, or its estate, as such, be administered. Joint commissions were essentially commissions against the individuals, operating upon the estates of each of the partners, and not maintainable except where separate commissions could be supported against each partner. "It was a prerequisite that all persons comprising the partnership be adjudged bankrupt before a warrant could issue entitling the assignee to administer the joint estate."¹

Under the act of 1898, a firm, as such, may be bankrupt, and the individuals composing it solvent.² Hence, where an act of bankruptcy in which one partner did not participate, has been committed by an insolvent firm, the partnership and the participating partner may be adjudged bankrupt in an involuntary proceeding, though the court has no jurisdiction in such proceeding so to adjudicate the non-participating member. So, too, where one of the partners was a minor, the partnership and the partner who was of age were adjudicated bankrupt, and the petition dismissed as against the minor partner.³ And the insanity of a partner and the appointment of a conservator of his estate will not prevent an adjudication of bankruptcy against the partnership.⁴ It is the scheme of our act "to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt."⁵ Consequently it has been held that the statutory filing fee must be deposited by the partnership and by each partner seeking the benefits of the act.⁶

These suggestions embody the recognized results of the new view of the nature of a partnership. This view is new only in the frankness of its expression in our system of jurisprudence. It is the common-sense view, the mercantile view, and the juridical view in the Roman, Continental, and Scotch systems. It is the view which has been gaining followers in the United States and recognition by the legislatures and the courts.⁷ Inasmuch as

¹ *In re Cook*, Fed. Cas. 3150; *In re Weaver*, Fed. Cas. 17307; *In re Shephard*, Fed. Cas. 12754; *In re Redmond*, Fed. Cas. 11632; *In re Meyer*, 98 Fed. Rep. 976, 979 (C. C. A.), aff. 92 Fed. Rep. 896.

² *In re Sanderlin*, 109 Fed. Rep. 857; *In re Grant Brothers*, 5 Am. B. Rep. 837, 839.

³ *In re Dunnigan*, 95 Fed. Rep. 428; *In re Duguid*, 100 Fed. Rep. 274.

⁴ *In re L. Stein & Co.*, 127 Fed. Rep. 547.

⁵ *In re Meyer*, n. 1 *supra*.

⁶ *In re Barden*, 101 Fed. Rep. 553; *In re Farley*, 115 Fed. Rep. 359. *Contra*, *In re Langslow*, 98 Fed. Rep. 869; *In re Gay*, *ibid.* 870; *cf. In re Grant Bros.*, 5 Am. B. Rep. 839.

⁷ Neither courts nor legislatures have frankly recognized the entity of a partner-

bankruptcy legislation usually declares the existent substantive law, the act of 1898 has, even by its partial recognition of the "entity" view, performed a valuable service in calling attention to the fact that the courts have already done the legislating, and that "to admit the fact is all that remains for them to do." That the recognized method of distribution of partnership and individual assets finds no support in principle even under the common law view, renders doubly unfortunate the failure of the act to apply the principles necessarily inherent in its view of the nature of a partnership.

These principles must be sought in the law of partnership. That the interest of each partner in the partnership property is his proportion, after the payment of the partnership debts, is a fundamental proposition.¹ It follows, since the right of the individual creditors of each partner is to look to the property of that partner, that the individual creditors have no claim against the partnership assets, as such, but are limited to the distributive share of their debtor. This share does not become the separate property of the partner until the payment of the partnership debts. It becomes evident that it is because of the nature of the partner's interest that the individual creditors are postponed to the partnership creditors in the distribution of the partnership assets. The priority of the partnership creditor is a necessary consequence, and his so-called subrogation to the right of each partner to compel the application of the partnership assets to the partnership debts, is as unnecessary in the explanation of this priority as it is incorrect as a statement of sound legal theory.² This priority is conceded where the common law view of the nature of a partnership prevails. It is also a necessary consequence of the adoption of the "entity" view, since the individual creditors manifestly have no rights against the juristic person with whom they have had no dealings.

ship, but both have provided for a partial recognition. For such action by the courts, see "The Firm as a Legal Person," 57 Cent. L. J. 343. For Legislative Recognition, see Stimson, Am. Stat. Law §§ 1304, 1370, 5305, 5323, 5340 *et seq.*, 8100-8106. See also 22 E. & A. Ency., 2d ed., 76, n. 9.

¹ Parsons on Partnership, 4th ed., § 178, p. 231; Lindley on Partnership *340; United States v. Hack, 8 Pet. (U. S.) 271, 275; Case v. Beauregard, 99 U. S. 119, 124; Menagh v. Whitwell, 52 N. Y. 146; Pratt v. McGuinness, 173 Mass. 170.

² See "The Firm as a Legal Person," 57 Cent. L. J. 343, and cases collected *ibid.* 345, n. 24, and 347, n. 34. Cf. Arnold v. Hagerman, 45 N. J. Eq. 186; Bannister v. Miller, 54 N. J. Eq. 121; Darby v. Gilligan, 33 W. Va. 246; Elliott v. Stevens, 38 N. H. 311; *Ex parte* Snowball, L. R. 7 Ch. App. 534.

The partnership principle, upon which the right of the partnership creditor to look to the estate of the individual partner rests, is that each partner is liable for the whole of the partnership debts.¹ This liability is secondary. Where the common law view of the nature of a partnership prevails, the liability of each partner *in solido* is secondary to the joint liability of all. Under the theory of the bankruptcy act, each partner occupies the position of surety for the firm. On the default of a principal obligor, the liability of his surety becomes absolute. A creditor is allowed to prove against the estate of the surety on this absolute liability, regardless of the financial condition of the principal.² The decisions under the common law view of the nature of a partnership, which make an arbitrary exception to the arbitrary rule of distribution, in permitting the partnership creditors to prove *pari passu* with the individual creditors in the absence of solvent partner or partnership assets,³ though explained on a mistaken notion of the equity rule of marshaling,⁴ can be supported on no other ground than that of the absolute liability of the partner on the default of the partnership. Proof against the estate of the partnership, the principal obligor, should in no way prejudice the right of the creditor to prove against the estate of the partner, the surety.⁵ To prejudice this right is, in effect, to admit that the law, which gives to the partnership creditor the security of the individual liability of the partner, deprives him of that security in whole or in part, as soon as its possession becomes of value. Of course, the creditor should not be permitted to recover more than one hundred per cent of his claim, but such defense as the partner might have against such recovery, would go to the amount of the recovery, and not to the time or amount of the proof.

The Bankruptcy Act, in acknowledging the entity of a partnership, must perforce acknowledge that the relation of a partner to his firm's liabilities is that of a surety. A method of distribution

¹ Lindley on Partnership *200; Parsons on Partnership, 4th ed., 328, 329.

² 5 HARV. L. REV. 406.

³ *In re West*, 39 Fed. Rep. 203; *In re Downing*, 3 N. B. Rep. 748; *In re Rice*, 9 N. B. Rep. 373. Under the act of 1898 this exception appears to have been retained. *In re Green*, 116 Fed. Rep. 118; *In re Conrader*, 118 Fed. Rep. 676. *Contra*, *In re Wilcox*, 94 Fed. Rep. 84, 107; *In re Mills*, 95 Fed. Rep. 269.

⁴ *In re Wilcox*, *supra*.

⁵ *Ex parte Marshal*, 1 Atk. 129; Lord Eldon in *Ex parte Rushforth*, 10 Ves. 409; *In re Pulsifer*, 14 Fed. Rep. 247; *In re Myers*, 78 Wis. 615; *Williams v. Importers' Bank*, 44 Ill. App. 295, 297; *In re Bates*, 118 Ill. 524; *Citizen's Bank v. Patterson*, 78 Ky. 291, 295; *In re Souther*, *Ex parte Talcott*, 2 Low. (U. S. Dist. Ct.) 320.

which denies a firm creditor the same right against a partner surety which it allows against a surety for a partnership, who is not such by reason of being a member of the firm, is, to say the least, anomalous. The provisions which postpone the partnership creditor to the individual creditor in participating in the individual assets are unsound in principle and not in harmony with the balance of the act.

There is, however, one principle of equity which might reduce the amount upon which dividends would be paid from the estate of the individual partner, namely, the principle of marshaling. The partnership estate and the individual estate of the partner constitute two funds in the hands of the bankruptcy court, both of which may, in the first instance, be resorted to by the partnership creditors, and one only by the individual creditors. Equity would compel the partnership creditors to exhaust the partnership estate before resorting to that of the partner. Whether or not this would reduce the amount upon which dividends should be allowed from the individual estate would depend upon whether the court adopted the theory that the amount upon which dividends should be allowed is that due at the time of distribution, or that due at the time of proof.¹ If the former view be adopted the partnership creditor's claim against the individual estate should be reduced by the amount received from the partnership estate, but he should in no event be postponed to the individual creditors.

Whichever of these views is adopted, the same results follow from the application of a third rule of the substantive law of partnership, without regard to the equity rule of marshaling. Each partner has a so-called lien or equity to compel the application of the firm assets to the payment of the partnership debts.² This

¹ Authorities on these conflicting theories are irreconcilable. The following seem to support the view that the amount upon which dividends should be allowed is that due at the time of distribution. *Security Investment Co. v. Bank*, 58 Kan. 414; *Delaware Co. v. Oxford Co.*, 38 N. J. Eq. 151; *State Nat. Bank v. Esterly*, 69 Oh. St. 24; *Savings Bank v. Woodward*, 137 Mass. 412; *Bank v. Bank*, 80 Md. 371, 382, 383; *Whitaker v. Bank*, 52 N. J. Eq. 400, 418; *State v. Nebraska Savings Bank*, 40 Neb. 342, 352, and cases cited 58 Cent. L. J. 111, n. It will be noted that many of these decisions are in cases in which the securities exhausted belonged to the estate of the insolvent, and the courts looked upon the amounts realized as payments by that estate. The following seem to support the contrary view. Cases cited in n, 5, p. 500; cases cited in 58 Cent. L. J. 111, n.; *Merrill v. Nat. Bank*, 173 U. S. 132; *Furness v. Union Nat. Bank*, 147 Ill. 570, 573; *Kellogg v. Miller*, 22 Ore. 406, and cases therein cited.

² *Lindley on Partnership* * 351; *Bates on Partnership* § 820, p. 867.

equity is sometimes said to be based upon an implied term of the partnership articles. The doctrines of suretyship make a resort to this implication unnecessary. As has been seen, under either view of the nature of a partnership, the individual liability of a partner is secondary. He has the surety's right to exoneration by his principal, which right matures with the maturity of the obligation.¹ This right to exoneration would compel the application of partnership assets to partnership debts before recourse is had to the individual estates, whenever the court has jurisdiction over partners and partnership.

The remaining partnership principle which enters into the distribution of the firm and individual assets, is that a partner paying a partnership debt is entitled to reimbursement from the partnership, or contribution from the partners, *after the creditors of the firm have been satisfied*, provided a balance is due him on a statement of the partnership account.² This right to reimbursement and contribution also finds its explanation in the equitable doctrines of suretyship.³ The exercise of this right is postponed until the partnership creditors have been satisfied, because each partner is surety for every debt of the partnership and hence cannot equitably compete with the firm creditors.⁴ The situation is analogous to that of a surety on several notes secured by the same collateral. On paying one of the notes he is not entitled to subrogation to its holder's rights, so as to compete with the holders of the remaining notes.⁵ "Indemnification and not profit is the measure of the surety's recourse" against both the principal and the co-surety. The right to reimbursement from the partnership estate is limited to the amount actually paid by the partner or his estate. The surety cannot profit at the expense of his princi-

¹ See Ames, Cases on Suretyship 598, n. and cases cited.

² Collyer on Partnership, 6th ed., § 109; Bates on Partnership § 836, p. 893; Lindley on Partnership * 383, 721 *et seq.*, 740; Coleman v. Coleman, 78 Ind. 344, 347; Lyons v. Murray, 95 Mo. 23; Gordon v. His Creditors, 6 Rob. (Ala.) 328; Fissler v. Hickernsill, 82 Pa. St. 150.

³ Pratt v. Law, 9 Cranch (U. S.) 456; Simpson v. Gardiner, 97 Ill. 237, 241; Haverford v. Fire Ass'n, 180 Pa. St. 522; Stebbins v. Willard, 53 Vt. 665; Dobyns v. Rawley, 76 Va. 537.

⁴ Amsinck v. Bean, 22 Wall. (U. S.) 395, 402; Emery v. Bank, 7 N. B. Rep. 217; *Ex parte* Lodge, 1 Ves. Jun. 166; *Ex parte* Maude, L. R. 2 Ch. App. 555; McLean v. Johnson, 3 McLean 202.

⁵ Carithers v. Stuart, 87 Ind. 424, 433; Massie v. Mann, 17 Ia. 131, 135. *Cf. Ex parte* Marshal, 1 Atk. 129; *Ex parte* Watson, 42 L. T. R. 516; Farebrother v. Wodhouse, 23 Beav. 18. See also cases under n. 2, *supra*.

pal.¹ The right to contribution does not arise until a surety has paid more than his share.² Hence, unless the payment made before bankruptcy, or the dividend paid from the partner's separate estate, is in excess of his proportionate share of the whole debt, there is no right to contribution. The partner who has paid the whole of a partnership debt should, on the theory of subrogation,³ be permitted to prove against the other partners to the full amount of the debt, and to receive dividends until reimbursed for all except his aliquot part.⁴ But the authorities seem to regard only the right to contribution and to limit the proof to the due proportion of the partner against whom proof is made.⁵

The rule against double proof would bar any right to reimbursement or contribution if the creditor has proved against the estates of the partnership and the partners.⁶

The following have been found to be the rules of substantive law entering into the distribution of the assets of the estates of partners and partnership.

(1) The interest of each partner in the partnership property is his proportion after the payment of the partnership debts.

(2) Each partner is liable for the whole of the partnership debts.

(3) Each partner has an equity to compel the application of the firm assets to the payment of the partnership debts.

(4) A partner paying a partnership debt is entitled to reimbursement from the partnership, or contribution from the partners, provided a balance is due him on a statement of the partnership account.

In the first of these rules we find the justification of the partnership creditor's priority in the partnership assets; in the second, is the basis of the right of the partnership creditor to share in the assets of the individual estates; in the third, we find the

¹ Succession of Dinkgrave, 31 La. An. 703, 707; *Eaton v. Lambert*, 1 Neb. 339; *Martin v. Ellerbe*, 70 Ala. 326, 338; *Coggeshall v. Ruggles*, 62 Ill. 401; *Delaware Co. v. Oxford Co.*, 38 N. J. Eq. 151; *Mathews v. Hall*, 21 W. Va. 510, 514.

² *Davies v. Humphreys*, 6 M. & W. 153; *Ex parte Snowden*, 17 Ch. D. 44; *Richter v. Heming*, 110 Cal. 530, 537; *Hooper v. Hooper*, 81 Md. 155; *Bushnell v. Bushnell*, 77 Wis. 435.

³ Cases cited in n. 3, p. 502.

⁴ *Pace v. Pace*, 95 Va. 792; *Hess's Estate*, 69 Pa. St. 272; Professor Ames in 5 HARV. L. REV. 406.

⁵ *Ex parte Watson*, Buck 449, 455; *Ex parte Smith*, *ibid.* 492. Cf. *Ex parte Moore*, 2 Gl. & J. 167, 172; *Ex parte Plowden*, 2 Deac. 456, 463.

⁶ *In re Bingham*, 94 Fed. Rep. 796; *Wolmerhausen v. Gullick*, 2 Ch. 514.

partnership creditor compelled to exhaust the partnership assets before receiving dividends from the individual estates, and in the last, we find an equitable adjustment of the claims of the partners and partnership against one another.

The Bankruptcy Act of 1898 in section 5 f provides for the partnership creditor's priority in the partnership property. Section 5 g, a novelty in bankruptcy legislation, provides for proof for the purpose of securing equitable distribution of the property of the several estates. This act persists in the confusion of the second and third of the above rules, with the result that it perpetuates in the modern view the error which has become law, by common concurrence, under the common law view of the nature of a partnership. The right of the partnership creditor to share in the individual estates *pari passu* with the individual creditors has long been recognized as a necessary consequence of regarding a partnership as an entity.¹ The Scotch rule of distribution is that "upon the sequestration of copartners their separate estates are applicable to the payment *pari passu* of their respective separate debts, *and of so much of the partnership debts as the partnership estate is insufficient to satisfy.*"² This rule enforces our second and third doctrines of the law of partnership. It is to be regretted that Congress failed to carry these doctrines into effect, despite the excellent precedent in the Scotch law.

William F. Shroder.

CINCINNATI, OHIO.

¹ Bankruptcy of Partners, 7 Law Quart. Rev. 53; 4 HARV. L. REV. 333.

² Bell, Dig. of Law of Scotland (1882) 706, quoted in Pollock's Dig. of the Law of Partnership, 6th ed., 146 *et seq.*

THE PLAINTIFF'S ILLEGAL ACT AS A DEFENSE IN ACTIONS OF TORT.

IN order to avoid misapprehension as to the scope of this article, it should be stated at the start that it is not proposed to discuss cases in which the action is for the conversion of property obtained under an illegal contract, or cases in which it is alleged that the parties were jointly engaged in an unlawful enterprise. The discussion is to be confined to cases in which the relation of the parties did not arise out of an illegal contract, and in which the defendant was not acting in concert with the plaintiff, but was chargeable with negligence only. From these cases, again, are to be excluded those in which the question is whether or not the fact that the plaintiff's act was unlawful is evidence of contributory negligence. The cases to be considered are those in which physical damage has been done to the plaintiff's person or property through the defendant's negligent acts or omissions, so that an action would doubtless lie but for some unlawful act by the plaintiff which is alleged to have been a contributing cause of the damage. Furthermore, those cases only are to be discussed in which the unlawful act was in no sense an offense against the defendant personally, but was a breach of some duty to the public for which the plaintiff might have been prosecuted criminally.

The right of a plaintiff to recover in this class of cases has been one of the most disputed questions in the whole law of torts; yet there seems to be a general agreement as to the principles on which such cases are to be decided. It is conceded by all that, if the unlawful act was the cause, or a concurring cause, of the damage, the action is barred, and not otherwise. The whole controversy is as to what acts are to be considered causes and what mere conditions.¹ It must be admitted that the present strong

¹ "While all or nearly all of the courts of last resort in the United States that have had the subject under consideration agree in the legal proposition that any culpable negligence or any illegal act on the part of the plaintiff which essentially contributes to his injury will prevent a recovery, yet there is a marked difference of opinion as to what constitutes a contributory cause of injury." *Per* LOOMIS, J., in *Broschart v. Tuttle*, 59 Conn. 1, 13. The United States Supreme Court appears to deny the whole doctrine that the action fails if the plaintiff's unlawful act was a concurring cause. Philadelphia,

tendency is to construe the word "cause," for this purpose, very narrowly, so that the defense based on the plaintiff's unlawful act is reduced almost to a nullity. It is, therefore, at the risk of some appearance of presumption that the writer asserts that the well-known Massachusetts decisions, giving a much broader scope to this defense, are not entirely wrong — that, on the contrary, many of them may be supported as sound in result, if not always in reasoning.

It is not contended, indeed, that all the Massachusetts decisions are consistent, either with themselves or with the principles on which they purport to rest. If, for example, *White v. Lang*¹ is right, it seems impossible not to say that *Lyons v. Desotelle*² is wrong. But it is an error to assume that these cases must all stand or fall together. Again, it is sometimes supposed that the Massachusetts court made a distinction between cases of violation of the Sunday law and cases involving other illegal acts, denying recovery in the former and permitting it in the latter.³ This is a misconception. Recovery was refused in *Heland v. Lowell*⁴ and in *Banks v. Highland Railway*,⁵ in neither of which cases was the Sunday law in any way involved. Yet the court followed the same reasoning as in the cases relating to the Sunday law. Indeed, in *Heland v. Lowell*, the authority relied on was *Bosworth v. Swansey*,⁶ which is the leading case denying recovery to a person injured while travelling on Sunday.⁷

The contention is, accordingly, that the right result in cases of this kind is midway between the two extremes — that while the Massachusetts court went too far in refusing recovery in such cases as *Lyons v. Desotelle*⁸ and *Stanton v. Metropolitan Railroad*,⁹ the

etc., *R. R. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 209. This is on the ground that the rule involves inflicting an unauthorized penalty for breaking the law. The same position is taken in Pennsylvania. *Mohney v. Cook*, 26 Pa. St. 342; *Piollet v. Simmers*, 106 Pa. St. 95. If these cases go farther than to affirm that the wrongdoer is not to be regarded as an outlaw, they seem opposed both to principle and to authority. See the vigorous treatment of the subject in *Broschart v. Tuttle*, *supra*, at p. 19.

¹ 128 Mass. 598.

² 124 Mass. 387.

³ See, for example, *Broschart v. Tuttle*, 59 Conn. 1, 14.

⁴ 3 Allen (Mass.) 407.

⁵ 136 Mass. 485.

⁶ 10 Met. (Mass.) 363.

⁷ *Bosworth v. Swansey* was also cited with approval in *Tuttle v. Lawrence*, 119 Mass. 276, in which case the illegal act consisted in the violation of a speed ordinance, though the immediate question was as to the burden of proof.

⁸ 124 Mass. 387.

⁹ 14 Allen (Mass.) 485.

New York court, for example, went as much too far in the other direction in permitting recovery in *Platz v. Cohoes*,¹ and that many of the Massachusetts decisions, denying recovery, are entirely sound.

Before proceeding to an examination of the cases, two preliminary matters should be considered. The first is that the abstract things called "negligence" and "illegality" never *caused* anything and never will. Physical results, if due to human agency at all, are caused by physical acts.² "Negligence" and "illegality" are simply qualities which characterize acts. If we speak of a result as "caused by negligence," this is only a short way of saying that the result was caused by acts which were characterized by negligence. In the same way, a result cannot properly be said to be caused by a person's breach of the law, unless we understand by this that the result was caused by the *act* which constituted the breach of the law. For most purposes the distinction is rather pedantic than important. In the present case, however, it is essential to remember that if we mean anything when we speak of "negligence" and "illegality" as causes, we mean negligent *acts* and illegal *acts*.

The second consideration is that there is a radical difference between the *cause* of an accident and the *blame* for it. In the ordinary action based on the defendant's negligent acts, the distinction may safely be, as it generally is, disregarded. This is not because it is not a real one, but because, in fixing liability, the law seeks out some negligent act among the many acts which form the chain of causation leading up to the result. If such an act is found and is not too remote from the result, the person responsible for it is held liable for the damage. The person thus responsible cannot, as a rule, be heard to say that the acts of others, perhaps those of the plaintiff himself, were even more directly the cause of the result than the act complained of. This may have been so, yet, in the eye of the law, the fact is irrelevant: the only question is whether the defendant's negligent act was a part of the chain of causation and not unreasonably remote from the result. It has thus become customary to speak of this act as the proximate cause of the result, as if no other act had anything immediately to do with it. And, for most purposes, no harm is done by this usage. But a

¹ 89 N. Y. 219.

² For convenience, the word "act" will be used in the broad sense proposed by Mr. Salmond, *i. e.*, as including both positive acts and omissions. See Salmond, *Jurisprudence* § 129.

case may arise in which it is important to decide whether the negligent act was not only in name but in fact the sole immediate cause. In such a case, it must not be overlooked that it by no means follows that because a person is to blame for a result, his acts were the immediate cause of it. It may well be that, considered purely as a matter of fact, some other act or acts constituted the active, efficient cause, and that the defendant's act was only a comparatively remote cause.

To illustrate. X drives carefully upon a bridge. The bridge is defective and gives way. Y is under a duty to exercise care in keeping the bridge safe, but the defect was of such a nature that it could not have been discovered by any exercise of care: hence, no one can be held liable for the accident. It seems plain that, in such a case, the act of driving is the active, immediate cause of the damage. The defect in the bridge was only a passive, antecedent condition: if, after the defect came into existence, nothing more had been done, no damage would have resulted to any one, though the defect remained for a hundred years. The defect was, to be sure, a *causa sine qua non*: the accident would not have happened if the bridge had been in good condition. But it was a comparatively remote cause: damage could result from it only when some active agency supervened. It seems evident that the latter is the immediate, efficient cause of the result, not the dangerous antecedent condition. As was said by Appleton, C. J., in a much-quoted opinion, "The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. . . . Ordinarily, that condition is usually termed the cause, whose share in the matter is most conspicuous and is the most immediately preceding and proximate to the event."¹

Now it is obvious that the question of liability cannot make any difference in the matter of cause. If the case put above be varied by supposing that the defect was one which Y might have discovered, had he acted with due diligence, he is, of course, to blame for the accident and must pay damages. It will be useless for him to contend that X's own act of driving was the immediate cause of the damage. He is liable if his negligent failure to repair the bridge forms any part of the train of causation leading up to the accident, unless it be unreasonably remote from it. But this cannot alter the fact that it was X's act and not Y's omission that constituted the active, immediate cause.

¹ Moulton v. Sanford, 51 Me. 127, 134.

In like manner, the fact that one of the acts leading up to the result was characterized by illegality cannot affect the question of cause. If the case above be again varied by supposing that X, in driving upon the bridge, acted unlawfully, it is plain that there is no difference in the matter of causation. The fact that X's act is characterized by illegality cannot make it any less the immediate cause than if it were lawful. Neither can the fact that Y's omission to remedy the defect is negligent make it any more the immediate cause than if the omission were in no way blameworthy. If, as has been seen, X's act would be considered the immediate cause if no question of negligence or illegality were raised, it is evident that the conclusion must be the same, though X's act is characterized by illegality and Y's omission by negligence.

If the foregoing reasoning is sound, its application to the defense based on the plaintiff's unlawful act is plain. If the action is barred whenever the wrongful act caused the accident, the question in each case must be what act was the immediate cause of the result, not who was to blame for it. If it is found that the defendant's act, while blameworthy, served only to create a passive, antecedent condition, and that the plaintiff's unlawful act was the active agency which finally brought about the result, the action must fail, because the unlawful act was the immediate cause of the damage. It follows from this that the much-discussed case of *Bosworth v. Swansey*¹ is entirely sound, as well as several other Massachusetts cases involving similar states of facts. *Bosworth v. Swansey* was an action against a town to recover for injuries received by the plaintiff through a defect in the highway while driving for secular purposes on Sunday. Recovery was denied, on the ground that the unlawful act of driving concurred in causing the damage. According to the principles set forth above, the decision is right. The failure of the town to repair the road merely created a passive condition. Damage could result from this only when some act was done. The act which, in this case, was this active, immediate cause was the unlawful act of driving. On the same principle, *Jones v. Andover*,² *Connolly v. Boston*,³ and *Davis v. Somerville*⁴ are right, the facts being substantially as in *Bosworth v. Swansey*. The same is true of *Heland v. Lowell*,⁵ another action based on a defect in the highway, but in which the unlawful act consisted in driving at a rate of speed forbidden by a city ordi-

¹ 10 Met. (Mass.) 363.

⁴ 128 Mass. 594.

² 10 Allen (Mass.) 18.

⁶ 3 Allen (Mass.) 407.

³ 117 Mass. 64.

nance. So, in *Read v. Boston & Albany Railroad*,¹ recovery was rightly refused. The plaintiff, a locomotive engineer, was running an unauthorized Sunday train, and was injured through a defect in the track. The defect was simply an antecedent condition; the unlawful act of running the locomotive was the immediate, efficient cause of the accident.

There seems to be no state outside of Massachusetts in which the view contended for has been maintained with any consistency. Nevertheless, there are very respectable authorities which tend to support it. Thus, in Maine, *Bosworth v. Swansey* has been followed,² though *Heland v. Lowell* is repudiated.³ In Vermont, on the other hand, recovery was refused in a case similar to *Heland v. Lowell*,⁴ though the reasoning of *Bosworth v. Swansey* is rejected: however, a person injured through a defect in the highway while driving for secular purposes on Sunday is not allowed to recover, on the ground that the statutes impose on the town no duty of care towards a wrongdoer.⁵ So, in Wisconsin, the whole Massachusetts doctrine as applied to the Sunday law is vigorously assailed;⁶ yet it is held that a person running upon a bridge a traction engine of a weight forbidden by law cannot recover for damage resulting from the fall of the bridge, even though the bridge would have fallen just the same had the engine been of no greater weight than the law allowed.⁷ A case in Texas also tends in favor of the view contended for, though differing in its facts from the others referred to. A horse escaped from his lot and ran through the highway until he came into contact with a barbed-wire fence erected by the defendants. It was held that it was error to submit to the jury the question whether the defendants were guilty of negligence in maintaining such a fence on the street, as the plaintiff was forbidden, by a city ordinance, to allow the horse thus to run at large.⁸

In Idaho,⁹ Kansas,¹⁰ New Hampshire,¹¹ and New York,¹² recovery has been allowed in cases substantially like *Bosworth v.*

¹ 140 Mass. 199.

² *Hinckley v. Penobscot*, 42 Me. 89; *Cratty v. Bangor*, 57 Me. 423; *Beacham v. Portsmouth Bridge*, 68 N. H. 382 (expounding the Maine law).

³ *Baker v. Portland*, 58 Me. 199.

⁴ *Abbott v. Wolcott*, 38 Vt. 666.

⁵ *Johnson v. Irasburg*, 47 Vt. 28; *Holcomb v. Danby*, 51 Vt. 428.

⁶ *Sutton v. Wauwatosa*, 29 Wis. 21.

⁷ *Welch v. Geneva*, 110 Wis. 388.

⁸ *Galveston Land and Improvement Co. v. Pracker*, 3 Tex. Civ. App. 261.

⁹ *Black v. Lewiston*, 2 Idaho (Hasb.) 276.

¹⁰ *Kansas City v. Orr*, 62 Kan. 61.

¹¹ *Sewell v. Webster*, 59 N. H. 586; *Wentworth v. Jefferson*, 60 N. H. 158.

¹² *Platz v. Cohoes*, 89 N. Y. 219.

Swansey in their facts, and no qualification is made in the rejection of the principles for which that case stands. In Connecticut¹ and Rhode Island,² also, the doctrine of *Bosworth v. Swansey* has been severely criticised, though, in each state, the question arose in a case of collision between vehicles, so that, as will presently be shown, the actual decisions are not necessarily in conflict.

The reasons given for these decisions are various, but the leading arguments in support of them are two: first, that the unlawful act was not the cause, because the same result would have followed if the act had been done at a time, in a manner, or for a purpose that rendered it lawful; second, that if the doctrine of *Bosworth v. Swansey* is applied logically, it must be held that, if a person is injured while doing *any* unlawful act whatsoever, he cannot recover, even though the act had no possible tendency to cause the result. The first argument is thus stated in *Kansas City v. Orr*,³ one of the latest decisions on the subject, the facts being similar to those in *Bosworth v. Swansey*: "The violation of the Sunday law . . . was not the efficient or proximate cause of the injury. . . . The time when the injury was inflicted is only an incident to the efficient cause of the injury. The injury occurred by reason of the defect in the street, and was as liable to have occurred under similar circumstances on Saturday or on Monday as it did on Sunday. There was not even a remote relation between the violation of the Sunday law and the injury which resulted from the negligence of the city in maintaining its streets in a proper condition." The plain answer to this assertion is that it "isn't so." As has been seen, when a person is injured through a defect in the highway, the *act* of driving or walking is the immediate, efficient cause of the damage. How, then, is it possible to say that the violation of the law had "not even a remote relation" to the accident? The act which constituted the violation of the law was itself the direct cause.

¹ *Broschart v. Tuttle*, 59 Conn. 1. (Although *Bosworth v. Swansey* was much criticised in this case, a judgment for the plaintiff was set aside and a new trial granted. The result was the same in the very recent case of *Monroe v. Hartford St. Ry.*, 76 Conn. 201, in which the unlawful act consisted in leaving a horse unhitched in the street. Thus it is somewhat difficult to say what is the law of Connecticut on this subject. However, it is believed that the later of the two cases shows a tendency to adopt the view contended for — *i. e.* to lay stress on the question whether the unlawful *act* caused the damage, as distinguished from the abstract "illegality.")

² *Baldwin v. Barney*, 12 R. I. 392.

³ 62 Kan. 61, 67.

As to the second argument, likewise, the answer has already been suggested. The decision in *Bosworth v. Swansey* leads to no such absurd result as is supposed. It does not in the least involve holding that a person injured while, for example, indulging in profanity cannot recover. It is plain that such an act as swearing has absolutely no place in the chain of causation leading up to the event. It cannot be said that if the act had not been done, the accident would not have happened. On the other hand, the unlawful act of driving, in such a case as *Bosworth v. Swansey*, is clearly a cause at least to this extent—that the accident could not have happened if it had not been done. Again, the argument thus far has been directed towards showing that the decision in *Bosworth v. Swansey* may well be supported without going even to this extent. It has been attempted to show that the unlawful act, in such a case, is not only *a* cause of the damage, but *the* immediate, efficient cause. If this be so, it is evident that the objection entirely fails, so far as this class of cases is concerned.

But it must not be forgotten that this article was not undertaken with a view to proving that the Massachusetts decisions are all to be supported. It seems impossible to reconcile many of them either with principle or with authority. It is unfair to assert that they require that recovery be refused whenever the injured party was engaged in an unlawful act at the time of the accident. In practically every Massachusetts case in which recovery was denied, the unlawful act was, at least, a *causa sine qua non*.¹ If the act had not been done, the damage would not have been suffered. But, even so, there is a great difference between such cases, as, for example, *Bosworth v. Swansey* and *Lyons v. Desotelle*.² The facts in the latter case were that the plaintiff drove a horse to a certain place on Sunday and hitched him; while the horse was thus standing, the defendant negligently ran into him. After a verdict for the plaintiff, the defendant's exceptions were sustained,

¹ In order to be perfectly accurate, the case of *McGrath v. Merwin*, 112 Mass. 467, should be noticed. The plaintiff was unlawfully clearing out a wheelpit on Sunday and was injured through a sudden starting of the machinery. Recovery was not allowed. Apparently, it was perfectly lawful for the plaintiff to go to the mill and to be in the wheelpit; the only breach of the law consisted in removing waste matter which had accumulated in the pit. This act was hardly even a *causa sine qua non*: had the plaintiff wholly abstained from doing it and remained perfectly motionless while in the wheelpit, he would have been injured equally. The result, however, can be supported, as the parties were joint lawbreakers; both were actively assisting in the unlawful work.

² 124 Mass. 387.

substantially on the ground that the unlawful act was a contributing cause of the damage. In *Bosworth v. Swansey*, as has been seen, the defendant's negligent act served only to create a dangerous passive condition; the plaintiff's unlawful act of driving was the active agency which finally produced the result. In *Lyons v. Desotelle*, on the other hand, the unlawful act served only to create a passive antecedent condition, from which damage could result only when some further act was done. Thus it would appear that the unlawful act of driving to the place where the horse was hitched was but a remote cause, whereas the defendant's act of driving negligently was the efficient, immediate cause. Hence, in order to support the decision, it must be held that if an unlawful act by the plaintiff can be found anywhere in the chain of causation leading up to the result, the action is barred.

The whole doctrine that recovery is to be denied if the plaintiff's unlawful act was a part of the cause is simply a rule based on public policy. And it might, indeed, be said that public policy requires a rule as stringent as that suggested: in a few cases the rule has been avowedly taken to be so.¹ But it is difficult to justify such an extreme view. The defense based on the plaintiff's wrongdoing is similar to the defense of illegality in an action on a contract. It is not permitted because the defendant deserves the favor of the court, but because the plaintiff has done something which makes the court unwilling to give him relief. The result is, therefore, in the nature of a punishment for the plaintiff's wrongdoing. Now, while this, in itself, is no reason for saying that the defense is never to be allowed,² any more than as regards illegality as a defense to a contract, yet it is evident that it should be restricted to close limits. It seems plain that if the illegal act is the immediate, active cause of the damage, recovery is rightly refused. But it is by no means so clear that public policy demands that, if the illegal act was simply a remote link in the chain of causation, the action shall be barred, and the almost unanimous opinion of the authorities is strong evidence that it does not.² If it be con-

¹ *Jones v. Andover*, 10 Allen (Mass.) 18; *Galveston Land and Improvement Co. v. Pracker*, 3 Tex. Civ. App. 261. In both of these cases the concession was unnecessary, as the unlawful act was not only *a* cause, but *the* immediate cause.

² The following citations, without pretending to be exhaustive, will, perhaps, be sufficient. In all these cases recovery was allowed, notwithstanding the unlawful act. *Louisville, etc., Ry. v. Frawley*, 110 Ind. 18 (plaintiff was injured while attempting to uncouple a car on Sunday. To the same effect, *Louisville, etc., Ry. v. Buck*, 116 Ind. 566); *Schmid v. Humphrey*, 48 Ia. 652 (plaintiff, while driving unlawfully on

ceded, accordingly, that the rule is that the action is not barred unless the unlawful act was the immediate, efficient cause of the damage, then it must follow that *Lyons v. Desotelle* is wrong. The same is true of several other Massachusetts cases, in which the unlawful act had only the effect of putting the plaintiff's person or property in a position to be injured through the defendant's negligence. Thus, in *Banks v. Highland Railway*,¹ the unlawful act consisted in carrying a cable across a street in such a manner as to constitute a nuisance: this simply created a passive condition from which damage could result only when some further act was done—in this case, the act of negligently running a car against the cable. The same applies to the various Massachusetts cases denying recovery to passengers injured while traveling for secular purposes on Sunday.² The unlawful act consisted in the plaintiff's putting himself in a position where the carrier's negligent act could operate upon him; the negligent act of the

Sunday, was injured through an assault by defendant's dog); *Illinois Central R. R. v. Dick*, 91 Ky. 434 (plaintiff was run down by a train while returning from unlawful Sunday work); *Bigelow v. Reed*, 51 Me. 325 (plaintiff's punga was standing unlawfully in the street; while in this position, it was run into by defendant's horse. To the same effect, *Neanou v. Uttech*, 46 Wis. 581); *Philadelphia, etc., R. R. v. Lehman*, 56 Md. 209 (plaintiff's cattle were injured while being unlawfully transported on Sunday); *Carroll v. Staten Island R. R.*, 58 N. Y. 126 (plaintiff, while traveling unlawfully on Sunday, was injured through the carrier's negligence. To the same effect, *Opsahl v. Judd*, 30 Minn. 126; *Delaware, etc., R. R. v. Trautwein*, 52 N. J. Law 169; *Landers v. Staten Island R. R.*, 13 Abb. Pr. n. s. 338; *Knowlton v. Milwaukee City Ry.*, 59 Wis. 278); *Wood v. Erie Ry.*, 72 N. Y. 196 (plaintiff was doing business under a firm name which it was unlawful for him to use. Goods shipped by him in such firm name were damaged in transit); *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104 (plaintiff was riding on the platform of a street car in violation of a city ordinance; defendant's wagon collided with the car); *Solarz v. Manhattan Ry.*, 29 N. Y. Supp. 1123; affirmed 32 N. Y. Supp. 1149 (plaintiff, while working on Sunday, was injured through the fall of a scaffolding); *H. & T. C. Ry. v. Rider*, 62 Tex. 267 (plaintiff was, on Sunday, engaged in removing a wreck from the track. A train was negligently run against a flat car upon which he was); *Boyden v. Fitchburg R. R.*, 70 Vt. 125 (plaintiff's intestate, while driving unlawfully on Sunday, was struck by a train at a grade crossing. To the same effect, *Van Auken v. Chicago, etc., Ry.*, 96 Mich. 307 (*semble*); *Morris v. Chicago, etc., R. R.*, 26 Fed. Rep. 22); *Hoadley v. International Paper Co.*, 72 Vt. 79 (plaintiff's intestate was killed while repairing a pulp digester on Sunday by the defendant's negligently allowing steam and gas to escape); *McArthur v. Green Bay, etc., Canal Co.*, 34 Wis. 139 (a canal boat navigated on Sunday was injured through the sudden escape of water from the canal).

¹ 136 Mass. 485.

² *Stanton v. Metropolitan R. R.*, 14 Allen (Mass.) 485; *Bucher v. Fitchburg R. R.*, 131 Mass. 156; *Day v. Highland St. Ry.*, 135 Mass. 113. (In the last case the plaintiff was a conductor, not a passenger, but the difference seems immaterial, so far as the question of cause is concerned.)

carrier, not the unlawful act of the passenger, was the immediate cause. So, in *Smith v. Boston & Maine Railroad*,¹ the plaintiff was traveling on the highway unlawfully on Sunday and was struck by a gate negligently operated. The unlawful act of traveling had no tendency to cause the gate to swing as it did: doubtless it would have swung in exactly the same manner if the plaintiff had been ten miles away. The only effect of the unlawful act was that the plaintiff was in a place where the defendant's negligent act could operate on him. So, also, *Wallace v. Merrimac, etc., Co.*² cannot be supported. The negligent act in that case consisted in running down the plaintiff's yacht, which he was unlawfully sailing on Sunday. The yacht may have been in motion at the time it was struck, but this motion had no tendency to produce the result: it caused the yacht to be in a position where the force negligently managed by the defendant could be exerted on it.

Not only are the authorities outside of Massachusetts practically unanimous in their disapproval of these cases, but it is impossible to reconcile them with other decisions in Massachusetts itself. Thus, in *Steele v. Burkhardt*,³ the unlawful act consisted in placing a wagon across a street; while in this position, it was negligently run into by the defendant. It seems plain that the unlawful act was not the direct cause of the damage: it had the effect of creating a passive condition. And it is held that the action may be maintained. So, in *Kearns v. Sowden*,⁴ the unlawful act was leaving a team unhitched in the street, and it is held that a person negligently running into the team is liable. So, again, in *White v. Lang*,⁵ the plaintiff was driving unlawfully on Sunday, but the damage was caused, not by a defect in the highway, but by an attack by the defendant's dog. The unlawful act, obviously, had no relation to the attack by the dog, except that it caused the plaintiff to be at a place where the dog could attack him. Here, also, it is held that the unlawful act did not prevent recovery.

It seems, therefore, that even the Massachusetts court has recognized the principle that the unlawful act is not a bar merely because it was a *causa sine qua non*. It is not enough that the unlawful act put the plaintiff or his property in a position to be affected by the defendant's negligent act: the unlawful act must

¹ 120 Mass. 490.

² 134 Mass. 95.

³ 104 Mass. 59.

⁴ 104 Mass. 63 n. To the same effect, *Klipper v. Coffey*, 44 Md. 117.

⁵ 128 Mass. 598.

be the active agency which finally produces the result.¹ If this distinction be recognized, it disposes of the great majority of cases in which the plaintiff's unlawful act is set up as a defense. In one large class of cases, the defendant's negligent act creates a passive condition, while the plaintiff's unlawful act is the active, efficient cause of the damage, as in *Bosworth v. Swansey*. In another, and probably much larger class of cases, the defendant's act is the active, efficient cause, the plaintiff's act only creating an antecedent condition, as in *Steele v. Burkhardt*. However, there may be cases which cannot be placed under either of these heads, both the unlawful act and the negligent act being active, efficient causes. This is particularly true in the case of a collision between vehicles moving in opposite directions. It is plain that, from one point of view, both the plaintiff's act of driving and that of the defendant constituted active, efficient causes of the damage. Yet it does not necessarily follow from the foregoing reasoning as to *Bosworth v. Swansey* that the action is barred. In that case, the defendants exerted no unlawful force on the plaintiff: they simply allowed a condition to exist which made it possible for the plaintiff's unlawful act to have the effect of injuring him. The present case is materially different. The defendant unlawfully exerted force on the plaintiff so as to injure him. Though the plaintiff was, at the time, doing an unlawful act, yet that act had no tendency to bring the force controlled by the defendant to bear on him, except that it put the plaintiff in a position where such force could operate on him. It would not be illogical to hold that the result should be the same as in *Bosworth v. Swansey*: on the other hand, there is a plain distinction between the cases. Thus, it cannot be said that the decisions, which are strongly in favor of recovery in this last state of facts, are wrong.²

¹ The latest Massachusetts case on the point is *Newcomb v. Boston Protective Department*, 146 Mass. 596. The facts in this case were similar to those in *Steele v. Burkhardt*, *supra*. The plaintiff obtained a verdict, but a new trial was granted on the ground that the instructions to the jury treated the illegality of the plaintiff's act only as evidence of negligence. The *dicta* seem, on the whole, to confirm the writer's position, though they cannot be said to be conclusive. At a second trial, the plaintiff again obtained a verdict, upon which judgment was ordered by the Supreme Judicial Court, 151 Mass. 215.

² *Hall v. Ripley*, 119 Mass. 135 (plaintiff was driving at a forbidden rate of speed); *Baldwin v. Barney*, 12 R. I. 392 (plaintiff was driving for secular purposes on Sunday); *Broschart v. Tuttle*, 59 Conn. 1; *Riepe v. Elting*, 89 Ia. 82; *Spofford v. Harlow*, 3 Allen (Mass.) 176; *Beckerle v. Weiman*, 12 Mo. App. 354; *Quinn v. O'Keefe*, 9 N. Y. App. Div. 68. (In the last five cases, the objection to recovery was that the plaintiff

To sum up, the defense of the plaintiff's wrongdoing may be set up in three classes of cases. In the first, the defendant's negligent act creates a dangerous antecedent condition; the plaintiff then does an unlawful act from which, by reason of this dangerous condition, damage results. It is contended that the unlawful act is the immediate cause of the damage and that the action should, therefore, be barred. In the second, the unlawful act creates a passive condition: the defendant then does a negligent act which, supervening upon the condition which has thus been created, results in damage. It is maintained that the unlawful act is a cause of the damage, but so remote a cause that it ought not to have the effect of preventing recovery. In the third, the direct cause of the damage is a combination of agencies operating simultaneously, one being the unlawful act of the plaintiff and the other the negligent act of the defendant. This case is more doubtful, but, on the whole, the decisions permitting recovery seem right.

In conclusion, it is submitted that the rule contended for is at once practicable and just. It is practicable because the distinctions it calls for are readily applied to the great majority of cases. It can seldom, if ever, be difficult to decide whether the unlawful act is a *causa sine qua non*. If it be found that it is thus a part of the chain of causation, the only question will be whether the negligent act, before the accident happened, had issued in a passive condition upon which the unlawful act supervened. The action will be barred only in case it is found that it was the unlawful act which brought damage out of such a passive condition. The proposed rule is also just. Surely, it is unseemly that a person should appeal to the law for redress for an injury caused directly

was driving on the left side of the road; the decisions may, in part, be explained as resting on the peculiar nature of the "law of the road," which the courts seem inclined to treat rather as a rule of evidence, establishing merely a presumption of carelessness, than as an inflexible rule of law. See *Smith v. Gardner*, 11 Gray (Mass.) 418; *Gale v. Lisbon*, 52 N. H. 174.)

The plaintiff also recovered, notwithstanding the unlawful act, in two cases relating to collisions of ferryboats, — *Hoffman v. Union Ferry Co.*, 68 N. Y. 385; *Minerly v. Union Ferry Co.*, 56 Hun (N. Y.) 113. In the first case, the plaintiff's boat did not display the lights required by law; in the second, it was running at a forbidden rate of speed and out of the established channel.

It seems to be conceded that there can be no recovery if, after the defendant became aware of the unlawful act on the part of the plaintiff, he could not have avoided the consequences of it. *Central, etc., Co. v. Brunswick & Western R. R.*, 87 Ga. 386. But this is hardly more than saying that if the defendant was not negligent, he is not liable in any event.

by his own unlawful act, and only remotely by other circumstances. It is sometimes objected that this rule makes an outlaw of a person whose offense may be most trifling. The fact is quite otherwise. It is well agreed that the plaintiff's violation of the law is no defense if the defendant acted wantonly or maliciously.¹ And if denying redress for an injury negligently done makes an outlaw of the wrongdoer, it can only be said that this is just as true as to denying recovery to one guilty of contributory negligence. An objection to the doctrine of contributory negligence on this ground would be a novelty, to say the least. Certainly, it is as right that a person whose unlawful act has directly caused his injury should not recover as that one should be barred whose negligent act has, even in the slightest degree, formed a part of the immediate cause of the damage he has suffered.

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¹ *Welch v. Wesson*, 6 Gray (Mass.) 505; *Wallace v. Merrimac, etc., Co.*, 134 Mass. 95.

ANCILLARY RECEIVERSHIPS IN BANKRUPTCY.

ALTHOUGH there was no express provision in the Bankruptcy Act of 1867 authorizing the appointment of receivers for the care and custody of bankrupt estates until the selection of trustees, it was almost universally held that, within the general equity powers of a court of bankruptcy, the judge had the power to appoint such a receiver where the circumstances rendered it desirable.¹ The present Bankruptcy Act, however, expressly invests the court of bankruptcy with power to "appoint receivers or marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of assets, to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed, or the trustee is qualified."² In addition, it has sometimes been considered that the court might extend the powers of a receiver when appointed, under the further provisions of the Act granting it full power to "make such orders, issue such processes, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act."³

Where assets of the bankrupt are located in two or more federal judicial districts, an interesting question arises as to the status, rights, and duties of a receiver in bankruptcy appointed by the district court of original jurisdiction. He finds himself in one of three positions in regard to assets in a foreign judicial district:

First, the order and appointment may carry with it the right and duty to take the assets wherever found, irrespective of the federal court divisions.

Second, the original appointment may confer on the receiver the right to apply for recognition to any district court within whose jurisdiction assets are located, and *the right* to have such court confirm or extend the original order and appointment.

¹ *Lansing v. Manton*, Fed. Cas. 8077; *Sedgwick v. Place*, Fed. Cas. 12619; *Keenan v. Shannon*, Fed. Cas. 7640.

² Bankruptcy Law of 1898 § 2 (3).

³ *Ibid* § 2 (15).

Third, the original appointment may give the receiver merely the privilege of applying to such district court for recognition, and it may be within the discretion of the judge to entertain such application, or to make such other ancillary appointment, as he sees fit.

A bankruptcy receivership is merely temporary, often a matter of days, but generally of vital importance to the welfare of the estate. Usually the exigencies of the case demand immediate determination. The conservation of large and scattered commercial interests pending a consideration of the situation by creditors requires immediate action and not speculation on legal theories. The easy, safe, and quick way is to ask the assistance of the courts wherever there is any possibility of doubt. Out of abundance of precaution, the practice has been for a bankruptcy receiver to apply to the judge of each district court within whose jurisdiction property of the bankrupt estate is located to confirm or to extend his original appointment, or to appoint him ancillary receiver for such district. No nice distinctions are made in the application. It is immaterial to the receiver whether his authority is derived from his original appointment, or whether he acts by virtue of the decrees of an ancillary jurisdiction. His object is to have some decree of a court back of him sufficient to protect him in seizing, holding, and conserving the property which he finds in the bankrupt's possession. The more orders and decrees he has, the safer he feels.

Almost without serious consideration the courts have fallen into the practice of granting these applications, *ex parte*, or by general consent, until they find themselves committed to it without having expressed any opinion on the subject whatsoever. There are but seven reported cases from six different jurisdictions which touch the question. One is almost tempted to say that they represent as many different points of view. Arranged in chronological order, they are as follows:

IN RE SCHROM.¹ This was an application by a receiver in involuntary bankruptcy proceedings in Iowa for authority from his own court to bring a suit in Illinois to obtain possession and control of property there. The court refused the application because "the adjudication in bankruptcy has not yet been had, and this court has not yet been clothed with the full jurisdiction over the prop-

¹ November, 1899, Northern District of Iowa, 97 Fed. Rep. 760, 3 Am. B. Rep. 352.

erty of the alleged bankrupt that will accrue after the adjudication has taken place. . . . The proper course to pursue is for the petitioning creditors to take proceedings in the proper court, state or federal, in Illinois, in their own name, setting up the proceedings now pending in bankruptcy in this court as the basis of their action, and asking that court to protect the rights of creditors in the property in Illinois, either by the appointment of a receiver, by injunction, or any other appropriate remedy."

IN RE PEISER.¹ A receiver appointed in New York claimed funds in a Trust Company in Pennsylvania. The Trust Company refused to pay in obedience to an order of the New York Court, which thereupon fined its officers for contempt. The court, referring to the fact that neither of these officers was within its jurisdiction, directed the receiver to apply to the district court for the Eastern District of Pennsylvania "for its assistance in enforcing the order of contempt." On such a petition by the receiver, the Pennsylvania court, without any written opinion, ordered the Trust Company to turn over to him the money on deposit.

IN RE WILLIAMS.² This was a petition by certain creditors alleging that they had instituted involuntary bankruptcy proceedings in Colorado and asking the Arkansas court, as auxiliary to the district court of Colorado, to grant an injunction restraining parties having possession of the bankrupt's property from disposing of it. The application was denied on the ground that the Bankruptcy Act "makes no provision for ancillary or auxiliary proceedings in district courts other than that in which the proceedings are pending."

IN RE WILLIAMS.³ In considering an application by a trustee for the examination of witnesses in bankruptcy proceedings pending in another jurisdiction, the court discussed generally the question of ancillary or auxiliary jurisdiction. It concluded that,

"It is not necessary to go into the technicalities of any of these examples of ancillary or auxiliary jurisdiction, because the existing bankruptcy statute is absolutely destitute of any hint of such a jurisdiction in aid of proceedings in bankruptcy pending in another district or court of bankruptcy. Possibly, Congress might have adopted such a scheme of bankruptcy, and

¹ April, 1902, Eastern District of Pennsylvania, 115 Fed. Rep. 199, 7 Am. B. Rep. 690

² February, 1903, Eastern District of Arkansas, 120 Fed. Rep. 38, 9 Am. B. Rep. 741.

³ May, 1903, Western District of Tennessee, 123 Fed. Rep. 321, 10 Am. B. Rep. 538.

might have made every district court in the United States a kind of administrator *ad colligendum* of the assets within that district in aid of the original court of bankruptcy charged with the administration of the bankrupt's property; but Congress has done no such thing, and therefore the district courts in the several States have no such ancillary or auxiliary jurisdiction as has been invoked by these applications."

ROSS-MEEHAN FOUNDRY CO. *v.* SOUTHERN CAR & FOUNDRY CO.¹ In this case a petition for an ancillary receiver was denied for formal defects in the application. The court concludes that upon a proper petition and notice to all parties in interest such an ancillary receiver might be appointed.

"It requires a formal bill in equity against the proper parties, in a court of competent equity jurisdiction, to obtain that auxiliary relief which the petitioning creditors need and seek by this proceeding. A district court of the United States may be one of such courts of equitable jurisdiction, if the bankruptcy statute so provides; but it does not possess the power *qua* a court of bankruptcy to entertain such a bill."

MATTER OF SUTTER BROS.² This was a motion by a bankrupt to vacate an order for examination under Section 21 a. In denying the motion, the court took occasion to say "the order of this court making the Chicago receivers, receivers here, makes this a case pending in *this* court."

IN RE TYBO MINING & REDUCTION CO.³ In this case an application in Nevada for the appointment and recognition of a trustee in bankruptcy appointed in the District of Maine was denied on the ground that the Bankruptcy Act confers no ancillary jurisdiction on a district court to aid in the administration of the estate of a person adjudicated in another district.

In the midst of such confusion in the decisions of our district courts, we naturally turn to the chancery practice of the United States circuit courts. Unfortunately equal confusion exists there. Owing to the jealousy with which each court guards its supremacy within its own jurisdiction, our courts have never dared follow the English practice of appointing receivers for property without regard to its location.⁴ The circuit courts have most often considered the question of ancillary receivers in connection

¹ July, 1903, Western District of Tennessee, 124 Fed. Rep. 403, 10 Am. B. Rep. 624.

² April, 1904, Southern District of New York, 131 Fed. Rep. 654, 11 Am. B. Rep. 632.

³ September, 1904 (Nevada), 132 Fed. Rep. 697, 13 Am. B. Rep. 62.

⁴ Thus a court of Chancery in London appoints a receiver for property in British India (*Logan v. Princess of Coorg*, Seton 810; *Keys v. Keys*, 1 Beav. 425), Canada

with the foreclosure of interstate railways where the property was partly in one district and partly in another, all forming a single line. It is, of course, apparent that such property must be administered by a single head, and that it would be fatal to have the railway handed over to as many independent receivers as there are districts through which it might run. Common sense and necessity early established the practice of appointing a receiver in the district where the railway was principally located, and, on grounds of comity by the courts of other districts, of appointing or confirming the original receiver in his office in each subsidiary district.¹ Until 1889, when Justice Harlan had occasion to consider this subject, it might almost be said that this was a settled practice.² His views, however, were opposed to it. A suit had been brought in the United States Circuit Court for Ohio, for the foreclosure of a mortgage on a railroad which extended through Ohio and West Virginia. After the appointment of a receiver in the Ohio proceedings a bill termed an "ancillary bill" was filed in the United States Circuit Court for West Virginia, praying the court to take "ancillary jurisdiction." It was admitted that nothing was desired or expected from the West Virginia court, except an order appointing or confirming the appointment of the original receiver, and such other orders as might be necessary to vest in him possession and control of such of the property as was in the West Virginia district. The application was refused on the grounds that the intervention of the West Virginia court could occur only in a separate and independent suit.³ The Circuit Court for the District of Massachusetts, however, refused to follow the decision of Justice Harlan, stating that in other districts bills whose only purpose is the appointment of an ancillary receiver "have been frequently entertained and acted upon." They decided to follow

(*Tyler v. Tyler*, Seton 811), China (*Houlditch v. Donegal*, 3 Bli. N. S. 301, 343), West Indies (Seton 813), Italy (*Hinton v. Ealli*, 24 L. J. Ch. 121), New South Wales (*Underwood v. Frost*, Seton 812).

¹ *Central Trust Co. v. Texas, etc., Ry.*, 22 Fed. Rep. 135; *Jennings v. Philadelphia, etc., Co.*, 23 Fed. Rep. 569; *Central Trust Co. v. Wabash, etc., Co.*, 29 Fed. Rep. 161, 618; *Colpane v. Templeton*, 106 Fed. Rep. 375; *Phinizy v. Augusta, etc., Co.*, 56 Fed. Rep. 273; *Clyde v. Richmond, etc., Co.*, 56 Fed. Rep. 539; *New York, etc., Co. v. New York, etc., Co.*, 58 Fed. Rep. 268; *Continental Trust Co. v. Toledo, etc., Co.*, 59 Fed. Rep. 518; *Dillon v. Oregon, etc., Co.*, 66 Fed. Rep. 622; *Chattanooga, etc., Co. v. Felton*, 69 Fed. Rep. 273.

² *Mercantile Trust Co. v. Kanawha R. Co.*, 39 Fed. Rep. 337.

³ *Accord, In re Brant*, 96 Fed. Rep. 257; *Compton v. Jessup*, 68 Fed. Rep. 263; see also *Green v. Star Cash and Package Car Co.*, 99 Fed. Rep. 656.

that practice and appoint such an ancillary receiver for the Philadelphia & Reading Railway Company "without prejudice to a full consideration of the question if hereafter a motion is made to dissolve or annul the order."¹

The interests at stake were so large and the need not only for immediate but assured relief generally so urgent, that the attorneys having railway foreclosures in hand could not risk having their plans miscarry in any single jurisdiction. Accordingly they devised the scheme of filing original and independent bills for foreclosure in the federal courts of each district through which the railway extended, procuring the appointment of the same receiver for each district on grounds of comity, and having duplicate decrees entered on all petitions in each district thereafter.² Thenceforth the question of ancillary receivers in the federal courts became merely academic. If a court refused the appointment, the applicant had only to change the form of the petition, label it an original bill, and accomplish the desired result.³

Conceivably this same practice is possible in the district courts by filing independent involuntary petitions in the different jurisdictions. But the Bankruptcy Act is framed, and the general orders of the Supreme Court provide for proceedings in but a single jurisdiction.⁴ Certainly no district judge would consent to act on an appointment for a receiver where the facts were disclosed that proceedings were already pending in another jurisdiction, and the sole object of the second petition was to procure the appointment of a receiver.

It has long been definitely settled in the federal courts that a receiver has no status beyond the territorial jurisdiction of the court which appointed him,⁵ unless he is invested with some statutory or other express authority to represent the parties to the litigation everywhere.⁶ It is, of course, immediately apparent from the Bankruptcy Act itself⁷ that the various district courts are vested only with authority "to exercise original jurisdiction in bank-

¹ *Platt v. Philadelphia, etc., Co.*, 54 Fed. Rep. 569.

² *Compton v. Jessup*, 68 Fed. Rep. 263; *High, Receivers* § 375 a.

³ *New York, etc., Co. v. New York, etc., Co.*, 58 Fed. Rep. 268.

⁴ Bankruptcy Law of 1898 § 2 (1); *General Orders in Bank. VI.*, 172 U. S. 653.

⁵ *Booth v. Clark*, 17 How. (U. S.) 322; *Hale v. Allinson*, 188 U. S. 56; *Hale v. Hardon*, 89 Fed. Rep. 283; *Hayward v. Leeson*, 176 Mass. at p. 325.

⁶ *Relfe v. Rundie*, 103 U. S. 222; *Howarth v. Lombard*, 175 Mass. 570; *Burr v. Smith*, 113 Fed. Rep. 858.

⁷ Bankruptcy Law of 1898 § 2.

ruptcy proceedings . . . within their respective territorial limits as now established." Unless, therefore, some statutory authority can be found, a bankruptcy receiver appointed by a court of such limited jurisdiction has a standing only within its shadow.

By the express provisions of section 70 a trustee in bankruptcy is invested "with the title of the bankrupt, as of the date he was adjudged a bankrupt." He is the true successor in title to the bankrupt. After his appointment and qualification, a bankruptcy trustee may go anywhere, without regard to district lines, to assert his title, and to protect or administer the estate. However, until he is appointed, even after adjudication, the title to the whole estate remains in the bankrupt.¹ There is nothing in the act providing for a change until the trustee is selected. The receiver is regarded as the mere temporary custodian chosen to take and retain possession of the visible property liable to waste and to deliver it to the trustee.² He is not invested with title, either by express statute or by general equity principles.³

It follows, therefore, that where the exigencies of the case require the receiver to travel beyond the jurisdiction of the appointing court, he comes into each foreign jurisdiction neither with authority to take the assets located therein, nor with power to ask the court to recognize, confirm, or extend his original appointment as of right.⁴ At most his is merely the privilege of asking recognition on grounds of comity. It is within the discretion of the court to refuse such recognition, to append conditions, to insist on the appointment of a co-ancillary receiver, or to appoint a different person altogether.⁵ "When such application is made, the court to which it is addressed exercises its own original jurisdiction . . . to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver."⁶ If he is appointed, he becomes an officer of the subsidiary court, and completely amenable to its control. His power and rights to the assets within its jurisdiction are derived from its decrees, and do not depend

¹ *Fuller v. N. Y. Fire Ins. Co.*, 184 Mass. 12.

² *Boonville Nat. Bank v. Blakley*, 107 Fed. Rep. 891, 6 Am. B. Rep. 13.

³ *Beach on Receivers* § 2; *Hale v. Hardon*, 89 Fed. Rep. 283; *Hilliker v. Hale*, 117 Fed. Rep. 220.

⁴ *Atkins v. Wabash, etc., Co.*, 29 Fed. Rep. 161.

⁵ *Sullivan v. Sheehan*, 89 Fed. Rep. 247; *Shinney v. North American, etc., Co.*, 97 Fed. Rep. at p. 12; *Kirker v. Owings*, 98 Fed. Rep. 499.

⁶ *Sands v. E. S. Greeley Co.*, 88 Fed. Rep. 130.

upon the decrees of the court of original jurisdiction extended or recognized on grounds of comity. There exist two distinct legal persons. The ancillary receiver owes obedience within the new jurisdiction only to the court that appoints him, and is to follow its directions irrespective of the orders of the court of original jurisdiction issued to him in his capacity of original receiver.¹

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¹ Union Trust Co. v. Atchison, etc., Co., 87 Fed. Rep. 530; Reynolds v. Stockton, 140 U. S. 254; Phinizy v. Augusta, etc., Co., 56 Fed. Rep. 273; Chattanooga, etc., Co. v. Felton, 69 Fed. Rep. 273.

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WHAT CONSTITUTES A CLOUD ON TITLE. — In order to invoke the assistance of equity in a suit to quiet title, a plaintiff must establish three propositions: (1) that he himself has the legal title;¹ (2) that he is in possession and consequently unable to clear his right by an action at law;² (3) that the adverse claim of the defendant in fact amounts to a cloud upon his title. The necessity of the first two requirements is obvious, and the law in regard to them well settled; but the question, what constitutes a cloud which equity will remove, has provoked a well-defined conflict among the authorities. By the rule in New York, which has the sanction of the weight of authority, the plaintiff must fail if the claim of the defendant is invalid on its face, or if, although valid on its face, it would inevitably fall to the ground in an action brought upon it through evidence which the defendant would be compelled to introduce in support of his necessary allegations.³ Moreover, *prima facie* validity will not suffice if the plaintiff could destroy the claimant's case by mere reference to the record. Thus, where the plaintiff and the defendant both claim under the same grantor, the defendant's deed is not regarded as a cloud if it is shown to be subsequent to that of the plaintiff.⁴ The question whether a claim constitutes a cloud accordingly resolves itself into the question of how much the plaintiff would have to prove to defeat an action brought upon it.

This course of reasoning has led at least one jurisdiction, California, to draw an arbitrary line making the existence of a cloud depend on whether

¹ Frost v. Spitley, 121 U. S. 552.

² Orton v. Smith, 18 How. (U. S.) 263.

³ Washburn v. Burnham, 63 N. Y. 132.

⁴ Bockes v. Lansing, 74 N. Y. 437.

the plaintiff in an action by the adverse claimant would have to offer any evidence to overthrow the latter's claims.⁵ The unfortunate result of such a distinction can best be shown by an illustration. If the plaintiff and the defendant both claim under a deed from the same grantor, the defendant's deed, although subsequent to that of the plaintiff, is a cloud, because the plaintiff, were his title attacked, would have to introduce evidence of the record. But if the defendant's deed is a forgery, or proceeded from a person outside the chain of title, the instrument, although valid upon its face, would not be a cloud, because these facts must necessarily appear and destroy the claimant's case without any proof on the part of the plaintiff. Since one claim may detract as much as the other from the value of the plaintiff's property, such a rule must often work injustice. Both the New York and the California doctrines lead to the extraordinary result of a defendant in a suit to quiet title arguing that his claim is invalid, and that he should therefore be left in undisturbed possession of it.⁶

Since the basis of this jurisdiction is to clear the plaintiff's title from claims which render it less marketable, the question should be not whether a claim fulfils certain technical requirements, but whether it is of a character to frighten away the average purchaser. In other words, if the claim is of sufficient magnitude materially to affect the market value of the plaintiff's property, it should be removed, or its creation enjoined.⁷ Upon this analysis it would seem that the Supreme Court of Washington rightly allowed a bill to quiet title against a defendant who apparently had but an oral claim. *Morgan & Co. v. Palmer*, 79 Pac. Rep. 476. It must be admitted, however, that the authorities have not gone so far.⁸

CONDEMNATION BY ELECTRIC POWER COMPANIES. — In every action for the condemnation of land two questions must be determined, — first, whether it is wanted for a public use, and second, whether that particular land is required. Ordinarily the second question presents no difficulties. When a highway or railway is to be laid out, a considerable discretion must necessarily be given as to the particular route to be followed, and when that is once determined, the necessity of taking any given piece of land arises from its physical location upon this selected route. The same principle is involved in other cases. Thus in the days of the flowage acts for public water-mills, the proximity of a water-fall made the adjoining land necessary from its very location. The same is, perhaps, true regarding the land, other than the right of way, which is required for the operation of a steam railway. Such things as round houses and repair shops must be near the road, and a reasonable discretion has always been permitted in locating them in cities and towns where they can be used conveniently. Very evidently, however, there must be a point where the necessity for any particular land ceases and the mere convenience of the condemning company begins.

This consideration becomes of greater importance where land is condemned by electric power companies. Although as to the right of way for

⁵ *Pixley v. Huggins*, 15 Cal. 127.

⁶ 3 Pomeroy, Eq. Jur., 2d ed., § 1399.

⁷ *Bishop v. Moorman*, 98 Ind. 1.

⁸ *Parker v. Shannon*, 121 Ill. 452. But see *City of Lafayette v. Wabash R. Co.*, 28 Ind. App. 497, holding, under a statute, that the plaintiff need not describe the defendant's claim.

their lines and tracks, and as to the location of their barns and repair shops, such companies are governed by the same principles as steam railroads, yet because of the ability to transmit power such great distances, it seems difficult to say that any particular land is necessary for the location of steam power-houses. That was the decision in a Rhode Island case, where a company operating three distinct lines of track sought to locate a central power station about equidistant from them all. There was nothing in the location of the land desired which made it necessary to any greater degree than much other land equally favorably situated, and the court held that under such circumstances the company should be required to purchase as any private individual.¹ The fact that there was abundant land available prevented any possibility of combination against the company, and since that is generally the case, it seems that the instances in which any particular land is necessary for such purposes must be extremely rare. The argument for any special location will usually amount to nothing more than the convenience of the company, or at the most its ability to serve the public more cheaply. Economy, however, because of the large number of elements entering into any computation of it, must always remain an extremely unsatisfactory ground upon which to base condemnation proceedings, even if principle would permit the taking of land without consent for such a reason. Certainly there is no more basis for allowing condemnation in these cases than for allowing a common expressman between two towns to condemn land for a stable. Although the land is desired for a public purpose, that particular land is not necessary.

In view of these considerations, the criticism of the Rhode Island decision contained in a recent New Hampshire case is unfortunate, particularly as the latter case had to decide only that the land was wanted for a public purpose. The fact that it was required to complete the right of way for the company's wires showed clearly that that particular land was necessary. *Rockingham, etc., Co. v. Hobbs*, 72 N. H. 531.

VALIDITY OF TRUSTS WHERE TRUSTEE IS DIRECTED TO CHOOSE THE CESTUI. — Future equitable estates, like future legal estates, may be subject to any limitations which do not violate the rule against perpetuities.¹ The *cestui que trust* may be changed by the happening of any prescribed contingency, for example, upon one's changing his name or ceasing to live in a certain house, upon the birth of a child,² or upon appointment by a person designated in the instrument.³ But in the very nature of things there can be no trust without a *cestui que trust*.⁴ Therefore, when an instrument showing that the holder of the legal title is not to take beneficially fails to indicate *cestuis que trust* for the entire equitable interest, equity raises a resulting trust for the grantor or his representatives, although it is expressly stated that the heirs shall not take.⁵ Likewise where property is devised on trust to build a monument, to take care of animals, or to pay for masses,

¹ *In re Rhode Island, etc., Co.*, 22 R. I. 457.

² Gray, *Perpetuities* § 66.

³ *Ibid.* § 61.

⁴ *Townshend v. Windham*, 2 Ves. 1, 9.

⁵ Y. B. 7 Ed. IV. 16, 17 b, *per* Brian, J. — In a feoffment to the use of the plain of Salisbury or the moon, the use is void. See 15 HARV. L. REV. 512.

⁶ *Fitch v. Weber*, 6 Hare 145.

the trust fails, for no *cestui que trust* is named and no contingency provided to determine one. It has been suggested that no constructive trust should be raised while the trustee is willing to use the property as the testator directed.⁶ Perhaps a sufficient answer is that equity, following the law, should allow no restrictions on the use of property except by contract or by conditions, and that unless justice requires the creation of a conditional estate without words of condition in the instrument, a resulting trust must arise for the heirs.⁷

The principle which allows a *cestui* to be changed on any contingency seems to have been overlooked in an early case where property was given on trust for beneficiaries to be selected by the trustee. The argument of counsel concerned itself mainly with the validity of the gift as a charitable trust, and, deciding that it was not, the court held it void for indefiniteness.⁸ This decision, recently approved by the New York Appellate Division, has been almost universally followed. *Mount v. Tuttle*, 99 N. Y. App. Div. 433.⁹ But such a trust is really no more indefinite than one for an unborn child,⁹ or for whomever the settlor may appoint.¹⁰ Until the child is born or the *cestui* appointed, the beneficial interest results to the grantor.¹¹ He is the definite *cestui que trust* till another definite *cestui* is determined by the happening of the contingency. The new *cestui* takes by force of the instrument of conveyance, and there seems no reason on principle why the contingency should not be allowed simply because it happens to be an appointment by the same person who holds the legal title as trustee.

It has been urged in support of the decision that the direction to appoint the beneficiary is mandatory and that "the law does not allow of irrevocable mandates."¹² But the cases cited in support of this proposition show only that a principal can always discharge his agent.¹³ This is because a conveyance through an agent is really a conveyance by the principal, and until consummated the principal can change his method at will. But the direction to choose a beneficiary is not like the command to an agent to make a conveyance; it is rather the means provided by the testator to determine for whose benefit the will shall operate. It is similar to the case where an executor is directed to sell the land; the vendee gets title by the will, and the heir cannot revoke the mandatory direction.¹⁴

THE DOCTRINE OF ORIGINAL PACKAGES. — State statutes prohibiting the sale of an article which is a legitimate subject of interstate commerce, or taxing it to discourage its sale, were early declared unconstitutional in so far as they tended to regulate interstate commerce.¹ It was recognized, however, that if carried to its full extent this constitutional protection must interfere unreasonably with the legitimate powers of the state. If strictly

⁶ See 5 HARV. L. REV. 389.

⁷ Cases are reviewed in 15 HARV. L. REV. 515. Some are on their facts supportable as charitable trusts, some as provisions for funeral expenses.

⁸ *Morice v. Bishop of Durham*, 10 Ves. Jun. 521.

⁹ *Hopkins v. Hopkins*, Cas. 4. Talb. 43.

¹⁰ *Clere's Case*, 6 Co. 17 b.

¹¹ *Ibid.*

¹² See 15 HARV. L. REV. 512.

¹³ See cases cited in 15 HARV. L. REV. 513, n. 1.

¹⁴ Y. B. 9 Hen. VI. 24 b, *per* Bobington, J.

¹ *Brown v. State of Maryland*, 12 Wheat. (U. S.) 419 (1827).

construed, it must protect foreign goods as long as they can be identified, since any prohibition of sale must interfere with importation. Chief Justice Marshall, declaring that some limitation was necessary, tentatively suggested, as the point beyond which the constitutional immunity of imported articles from taxation should not extend, the time "when the goods become mixed with the general property of the state." This has been the recognized criterion ever since, but its indefiniteness has made it difficult to apply.

Seizing on some words in the same opinion which might not have appeared had they not formed part of the statute there construed, later courts sought to establish a more specific line of distinction. Reasoning that packages in the hands of the importer are not mixed with the general property, and that, unless at least one sale is permitted, importation must cease, they considered the earlier case as laying down the rule that measures designed to discourage sale must not be permitted to prevent sale by the importer in the "original package."² When importers diminished the size of the shipping packages, so that they were convenient for ordinary retail sales, it became clear that a strict enforcement of the rule so declared, while not beyond the power of the constitution, must interfere with the state's powers of internal regulation to an extent inconsistent with the policy of the court. Lower courts, in dealing with the question, first escaped the difficulty by holding that open boxes, in which the packages were handled, even though they were furnished by the carrier, were the original packages within the rule, and were broken by the sale of separate packages.³ When the persevering importer shipped the small packages loose, avoiding the use of any box or basket, it was sought to confine the doctrine to packages suitable for wholesale trade.⁴ In a decision disallowing that distinction, the federal Supreme Court suggested a further self-imposed limitation on its powers, — that no protection will be extended to original packages whose size has been reduced below that of the customary shipping package, merely for the purpose of escaping state legislation.⁵ This was one of the grounds on which a later case was decided,⁶ and its unequivocal enunciation in a recent decision of the same court marks its definite establishment in our law. *Cook v. County of Marshall*, 25 Sup. Ct. Rep. 233. As has been pointed out in several cases by a consistent group of dissenting justices, it is no less a regulation of interstate commerce to stop the shipment of tobacco in small packages than in large, and the unwillingness of the importer to pay a tax or fine does not prevent his traffic in legitimate articles from being properly classed as interstate commerce. The rule, however, is based on the same principle which was recognized when the constitutional protection was originally limited to goods unmixed with those of the state, in that it gives the state certain independent and necessary powers of regulation, which must be denied if the letter of the law is to prevail.

POWER OF A CORPORATION TO PURCHASE ITS OWN SHARES. — That a corporation has no authority to make a business of trafficking in its own

² *Leisy v. Hardin*, 135 U. S. 100 (1890).

³ *Austin v. State*, 101 Tenn. 563; *In re Harmon*, 43 Fed. Rep. 372.

⁴ *Commonwealth v. Schollenberger*, 156 Pa. St. 201. But see *Keith v. State*, 91 Ala. 2; *Sawrie v. State*, 82 Fed. Rep. 615.

⁵ *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898).

⁶ *Austin v. Tennessee*, 179 U. S. 343 (1900).

shares is universally admitted.¹ But where a purchase of these shares is merely incidental to the legitimate objects of the corporation, there is no such unanimity of opinion. It is now well established in England and in some jurisdictions of the United States that, in the absence of express authority, a corporation ordinarily has no power to purchase its own shares. But the prevailing American view is that where there is no injury to creditors, the purchase may be made. Thus, such a purchase is permitted where the corporation is solvent. *Burnes v. Burnes*, 132 Fed. Rep. 485 (Circ. Ct., W. D. Mo.). But if it would render the corporation insolvent, it is prohibited. *In re S. P. Smith Lumber Co.*, 132 Fed. Rep. 618 (Dist. Ct., N. D. Tex.).

In support of the English doctrine it is urged that to imply the power to purchase would be unfair to creditors and remaining stockholders.² Persons who deal with the corporation rely upon the amount of its capital stock and have a right to assume that this asset will remain undiminished. In many cases they may look also to the stockholders themselves for the satisfaction of their claims. If the corporation pays for its own shares out of its capital, it reduces the fund available for creditors and at the same time limits the number of persons to whom the creditors may resort. There is this same limitation in the number of persons liable, even if the purchase is made from the net profits. If such transactions stand, then either the creditors' chances for obtaining payment are lessened or additional burdens are thrown upon the other stockholders. It is further argued, as a practical matter, that such purchases tend inevitably to fraud on the part of the directors, and to dishonest manipulation of the market by the corporation.³ On the other hand, it is pointed out in defense of the weight of American authority that the arguments based on protection to creditors and other stockholders do not apply where, by a vote of all the stockholders, stock is purchased from the net profits. Although, pending resale, there is a reduced number of stockholders, yet the stockholder who sold can still be held, not upon the discredited fiction of the assets being a trust fund for the creditors,⁴ but upon the broader ground that, since practically the stockholders are the debtors, a debtor should not be permitted to secure assets for himself to the injury of his creditors.⁵ Besides, protection to corporate creditors is, according to the prevalent American doctrine, a condition of the right to make such purchase. This being so, there would be no unfairness to remaining stockholders as to existing creditors, since no additional burdens would be cast on them. As to subsequent debts there might be an additional burden before the resale, and the consent of all the remaining stockholders should be required to render the sale valid. It is contended, too, that since a corporation may take its shares by way of gift⁶ or bequest⁷ and may buy them with debts due from the vendor,⁸ there is nothing inherent in its nature to prevent this power of purchase.

The solution of the question, on last analysis, seems to turn upon practical considerations. Undoubtedly there are times when the best business

¹ *Ashbury Ry., etc., Co. v. Riche*, L. R. 7 H. L. 653.

² *Trevor v. Whitworth*, 12 App. Cas. 409.

³ *Green Bri., Ultra Vires* 95.

⁴ *Hospes v. Northwestern, etc., Co.*, 48 Minn. 174.

⁵ *Crandall v. Lincoln*, 52 Conn. 73.

⁶ *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87.

⁷ *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. (Va.) 19.

⁸ *Taylor v. Miami Co.*, 6 Oh. 176.

management demands that some shares be bought. On the other hand, there is the probability that the power will be abused. The growing tendency in the United States is to allow the possibilities for good to outweigh the fears of harm.

VESTING OF STOCKHOLDERS' RIGHTS IN TRUSTEES. — Under present economic conditions where vast enterprises are carried on by corporations, stability of corporate management is necessary for success. A consistent policy can hardly be maintained if the board of directors is subject to frequent change by the majority stockholders. The mode of welding diverse interests into a common unit for the support of a continuous policy, is the voting trust. Such trusts have frequently been before the courts in cases where it was unnecessary to pass upon their inherent validity or invalidity. It is settled that if the object is illegal, for example, a secret personal advantage to the members of the pool, the agreement is void.¹ On the other hand, where the object is to protect third parties who, in reliance on the agreement, relinquish claims or advance money to the corporation, the trust is good.² In at least one square decision, however, the voting trust has been held void as contrary to public policy³ in that the stockholders should exercise their discretion on the questions submitted to them and should not be allowed permanently to divest themselves of the power of control in favor of those who have no beneficial interest in the corporation, and the New Jersey Court of Appeals has recently taken the same view. *Warren v. Pim*, 59 Atl. Rep. 773 (N. J.). There are a number of well-reasoned *dicta* to the contrary;⁴ and upon principle, since many of the stockholders in a large corporation scattered throughout the country have no knowledge of the methods of management and are unable to attend the stockholders' meetings, it is difficult to see why such trusts, if formed *bona fide* for the purpose of promoting the interests of the corporation, ought not to be supported. In practice they are most frequently used for the purpose of assuring to reorganized corporations a trustworthy management.

In reorganizing insolvent corporations a somewhat similar plan is frequently adopted. The readjustment of the disordered finances of such a corporation, especially in a manner to suit all concerned, is a difficult problem. Any arrangement by which a going concern is substituted for the insolvent one, benefits both stockholders and bondholders and should be completed as speedily as possible. Consequently, in order to avoid the delay necessarily incident to a submission of every proposed measure to the shareholders or bondholders, the reorganization committee is given legal title with practically unlimited discretionary powers in executing the trust. There would seem to be no serious objection to giving them full discretionary power, in working out the plan of reorganization, to change express stipulations as well as to add new ones, where necessary. It should be merely a question of interpretation whether they have been given such a power or not; but the language of some of the cases would deny the possibility of such

¹ *Shepang Voting Trust Cases*, 60 Conn. 553.

² *Mobile & Ohio R. R. Co. v. Nicholas*, 98 Ala. 92; *Greene v. Nash*, 85 Me. 148.

³ *Harvey v. Linville Improvement Co.*, 118 N. C. 693.

⁴ See *Brightman v. Bates*, 175 Mass. 105; *Brown v. Pacific Mail Steamship Co.*,

⁵ *Blatchf.* (U. S.) 525.

construction. *Industrial & General Trust v. Tod*, 180 N. Y. 215. In the only other case where this point seems to have been raised, the court took the same ground.⁵ Yet where the trustees are acting in good faith, there seems to be no greater objection to giving them full power of management in reorganization than in giving them similar power after organization by means of a voting trust. Therefore, in those jurisdictions where the voting trust is held valid, the reorganization agreement giving full power should be upheld also. In each case the stockholder divests himself of the immediate power of control and trusts to the honesty and discretion of others.

TITLE BONDS AS COLOR OF TITLE. — The confusion in the decisions attempting to define color of title is doubtless due in large part to the varying objects for which it becomes necessary to determine the meaning of the phrase. Its chief importance probably still consists in its connection with the doctrine of constructive adverse possession, which confers the right to acquire title to land not actually owned or occupied¹ as well as to bring trespass for entrance upon such land.² A second class of cases, however, is becoming steadily larger as a result of special statutes of limitation making color of title an essential element in the acquisition of title to land actually occupied.³ This is especially common in statutes prescribing a comparatively short period of limitation. In some jurisdictions, indeed, the requirement appears to have been made even in the absence of express mention in the statutes.⁴ Finally, a third of the main heads under which the discussions may be grouped, comprises actions brought under legislative provisions permitting recovery for improvements to land made *bona fide* and under color of title.⁵

It is not unnatural that in applying the statutory requirements to an individual case the courts have used language so broad as to be capable of application to cases of a different class. Upon this ground some attempt has been made to explain the conflict of authority as to the necessity of an instrument in writing, the adequacy of a deed void upon its face, and similar disputed questions.⁶ Unavailing though this attempt must in part be, it at least throws light upon points not yet hopelessly involved. It is, for instance, generally stated that bonds for title or executory contracts of sale will not give color of title. An examination of the decisions, however, discloses that many of them apply only to cases arising under short limitation statutes,⁷ a strict construction of which is not inappropriate. In other cases

⁵ See *Cox v. Stokes*, 156 N. Y. 491, 507.

¹ *Jackson d. Hasbrouck v. Vermilyea*, 6 Cow. (N. Y.) 677; *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426.

² 14 HARV. L. REV. 389.

³ *Dembitz, Land Titles* § 186. Statutes requiring color of title often define it for their purposes. See *Thompson v. Cragg*, 24 Tex. 582; *Finnegan v. Campbell*, 74 Ia. 158.

⁴ That is, courts have apparently required color of title in ordinary cases of adverse possession; but the phrase seems to have been used loosely in this connection as equivalent simply to claim of title. See *Sedgwick and Wait, Trial of Title to Land*, 2d ed., §§ 763, 764.

⁵ *Boyer v. Garner*, 116 N. C. 125.

⁶ 2 Va. L. Reg. 553; *Sedgwick and Wait, Trial of Title to Land*, 2d ed., §§ 763, 764.

⁷ *Hardin v. Crate*, 78 Ill. 533.

relied upon, the vendee under the executory contract claimed to have acquired a title as against his vendor by adverse possession.⁸ Here, plainly, the holding of the vendee was in subordination to the superior title of his vendor and not adverse to it. It does not follow that the written contract should not give color of title as against a stranger; and for the purpose of giving constructive possession,⁹ or of satisfying a special statutory requirement for lands actually occupied,¹⁰ it seems that it should. An Arkansas decision has, however, gone so far as to hold that a bond for title does not give sufficient color of title to warrant a statutory recovery against a third party, the real owner, for improvements made upon land under the *bona fide* belief that the obligor on the bond had good title. *Beasley v. Equitable Securities Co.*, 84 S. W. Rep. 224. It seems fairer to construe such statutes, founded, as they are, upon equitable principles,¹¹ so as to provide for the reimbursement of those who make improvements under a *bona fide* belief that they have a right to the land, whether their color of title be legal or equitable. To the language of the Arkansas statute indeed such a construction is especially applicable;¹² but in the interpretation of acts less explicit in terms, the same reasoning must apply.

ENFORCEMENT OF RESTRICTIVE COVENANTS.—The validity of agreements restricting the use of land is universally recognized. The burden is enforced against a grantee with notice on the ground that since he took with notice he must have paid less for the property than would otherwise have been the case. Consequently to allow him to avoid the obligation would be to enrich him unjustly at the expense of the covenantee.¹ The benefit runs in favor of all within the contemplation of the covenant. An owner of land may exact a restrictive covenant for his own personal advantage;² or he may secure it for himself as owner of the land, in which case it descends to each owner of the land.³ Again, he may seek to benefit a grantee to whom he has already conveyed land.⁴ But the most frequent case is when he sells land, laid out in lots, subject to a general restriction. Under such circumstances the purchasers are deemed to have entered into reciprocal agreements.⁵ Since a prior grantee may sue a subsequent purchaser, his right rests, not on any assignment of the covenants, but on the fact that each one has purchased with reference to the general plan.⁶ Yet

⁸ *Brown v. Huey*, 103 Ga. 448; *Ormond v. Martin*, 37 Ala. 598. After payment of the purchase money the vendee's possession is adverse to his vendor. *Hart v. Bostwick*, 14 Fla. 162.

⁹ *State Bank v. Smyers*, 2 Strobb. (S. C.) 24; *Jones v. Perry*, 10 Yerg. (Tenn.) 59.

¹⁰ *Burdell v. Blain*, 66 Ga. 169; cf. *Fain v. Garthwright*, 5 Ga. 6.

¹¹ *Cox v. McDivit*, 125 Mo. 358; *Whitney v. Richardson*, 31 Vt. 300.

¹² The Arkansas statute permits recovery "if any person believing himself to be the owner either in law or equity, under color of title has peaceably improved land." Other decisions denying recovery against his vendor to one in possession under a bond for title are based upon statutes requiring the claimant to be one holding adversely. See *Seymour v. Cleveland*, 9 S. Dak. 94; *Kilburn v. Ritchie*, 2 Cal. 145.

¹ See 17 HARV. L. REV. 174, 183.

² *Equitable Co. v. Brennan*, 148 N. Y. 661.

³ *Peck v. Conway*, 119 Mass. 546.

⁴ *Barron v. Richard*, 8 Paige (N. Y.) 351.

⁵ *Tallmadge v. East Bank*, 26 N. Y. 105.

⁶ *Mulligan v. Jordan*, 50 N. J. Eq. 363.

to allow a grantee the benefit it is not necessary, as is sometimes said, that the restrictive agreement must have entered into the consideration of his purchase. Once granted the intention to benefit such purchaser, knowledge on his part is unnecessary.⁷ In finding the intention of the parties to the original agreement in all these cases, the courts naturally reach different results upon somewhat similar facts.

In a late New York case, the grantee of a portion of a lot of land which had originally formed part of a larger tract and had been bought at a sale, subject to a building restriction, sought to enforce the agreement against the grantee of another portion of the same lot, but was denied relief. *Lewis v. Ely*, 100 N. Y. App. Div. 252. The covenant could, doubtless, have been enforced by either of the parties against any grantee, in whole or in part, from the other original purchasers.⁸ Equally, since the registry acts dispense with the necessity of actual notice, both parties would be bound to comply with the restriction at the suit of any grantee tracing his title from the other original purchasers. But the person from whom both plaintiff and defendant traced their title did not intend to bind successive owners of portions of his lot against each other. The agreements were entered into for the reciprocal benefit of the original purchasers and their successors. The result reached, though contrary to a New Jersey decision on a similar state of facts,⁹ is the logical conclusion from the recognized rule that an owner of a lot subject to a restrictive agreement cannot enforce the restriction against a grantee to whom he has conveyed a portion of the lot.¹⁰ The court, in its remarks, however, discloses the error into which one is likely to fall in adopting the New York conception of a restrictive agreement as an easement.¹¹ It speaks of the trend towards permitting only "the holders of the dominant estate and no other" to enforce "the burden of servitude," and questions the soundness of an earlier *dictum* that would allow a prior grantee an action against a subsequent purchaser. The proposition criticised, however, is supported by a square decision of the Court of Chancery,¹² and in no wise conflicts with the principal case. If it is manifest that such benefit was contemplated it should be enforced. Upon the test of intention each case is comparatively simple of solution, though there is, perhaps, a tendency in later cases to find that the covenant was entered into for the personal benefit of the covenantee.

DEGREES OF NEGLIGENCE. — Three theories have been advanced regarding degrees of negligence. The earlier English decisions, following the Roman law, classed negligence as slight, ordinary, and gross, varying conversely with the degree of care.¹ Within the last half-century two other views have been put forward. One suggests two degrees of negligence, (1) lack of that care required of the ordinary unskilled person, and (2) want of that care

⁷ See *Rogers v. Hosegood*, [1900] 2 Ch. 388, 407.

⁸ See *Schwoerer v. Boylston Market Ass.*, 99 Mass. 285.

⁹ *Winfield v. Henning*, 21 N. J. Eq. 188.

¹⁰ See *King v. Dickson*, 40 Ch. D. 596.

¹¹ 17 HARV. L. REV. 181.

¹² *Barron v. Richard*, *supra*.

¹ 1 Story, Bailm. § 17.

expected of the specialist.² The third, and now widely accepted view is that there are no degrees of negligence, but that negligence is absolute, namely, a lack of that care which the ordinary reasonable man would use under the circumstances.³ The third view seems the most satisfactory. The needlessness of the distinction made in the second theory may be illustrated as follows. If an unskilled man undertakes to run a locomotive, he is held to the same standard of care as a skilled engineer, for his negligence consists largely in his trying at all. If, on the other hand, he volunteers in a case of necessity, when no expert is at hand, the degree of care required of him will be less under the altered circumstances; but negligence remains the same, that is, a failure to exercise the degree of care required. Degrees of care undoubtedly exist. Yet, when a man has failed to use the required care, the amount by which he falls short of the standard is altogether immaterial.

It is true that many courts, still recognizing degrees of negligence, apply the term "gross negligence" to something which should be classed rather as a species of wilful misconduct than as negligence.⁴ An act done with a consciousness of probable results and reckless indifference to them contains another element beside the mere inadvertence characteristic of negligence. This may be well illustrated in the difference between the case of a locomotive engineer who accidentally falls asleep while running his train at high speed through a crowded city, and the case where he runs his train in the same way under these conditions when awake and conscious of the probability of accident. The former would be called "gross negligence" under the old rule; the latter is often named "gross negligence," but should be called "wantonness." Wantonness cannot involve actual intent to do the injury; yet it is clearly something different from negligence, which is mere inadvertence. Courts almost universally hold that contributory negligence of the plaintiff is no defense for "wantonness."⁵ The moment the more serious element of wilfulness enters, negligence is disregarded as a factor in the result. A recent Wisconsin decision recognized the distinction between wantonness and negligence by holding a verdict inconsistent which found that a death was produced by both the ordinary negligence of the defendant and also his "gross negligence," a term which the court unfortunately use in the sense of wantonness. *Rideout v. Traction Co.*, 101 N. W. Rep. 672. In fact, the elements of consciousness of the result and complete indifference as to injury place wantonness in a separate class between negligent and intentional torts. Wantonness is as reprehensible as intentional wrongdoing and should be classed with it.

THE LAST CHANCE RULE IN ADMIRALTY. — The consequences of contributory negligence at common law and in admiralty are different: at common law the plaintiff is barred; in admiralty the damages are divided. But do both systems adopt the same definition of contributory negligence? Is

² 1 Beven, *Negligence*, 2d ed., 20 ff.

³ *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489. See *Steamboat New World v. King*, 16 How. (U. S.) 469.

⁴ *Bolin v. Chicago, etc., R. Co.*, 108 Wis. 333.

⁵ *Central R. R. Co. v. Newman*, 94 Ga. 560. See *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250.

the rule of the last clear chance, as it has been evolved from the famous case of *Davies v. Mann*,¹ law on the water? England has decisively answered in the affirmative.² Singularly enough, in this country the question seems to have been considered for the first time only yesterday. *The Steam Dredge No. 1*, 134 Fed. Rep. 161 (C. C. A., First Circ.). The court in an elaborate *dictum*, answered it as decisively in the negative.

In its last analysis, the problem of contributory negligence is the problem of legal, or, as it is commonly expressed, of "proximate" cause. For it is to be observed that proximate, in its legal usage, defines nothing. That which the law regards as an efficient cause it terms proximate. What, then, is the nature of that negligence which the law declares to be a proximate cause when it asserts that he who neglects the last clear chance to avoid an injury must bear the loss? As the rule is ordinarily stated, it might well seem that proximate means simply proximity in time.³ Against such a statement of the rule it is not strange that the text-writers have protested.⁴ The fact that A's negligence precedes B's in time is not of itself significant. But when B's wrong takes the form of a negligent disregard of the conditions created by A's negligence, B's negligence may properly be regarded as the proximate cause, and B be compelled to stand the loss.⁵ For, to regard A's negligence as a proximate cause — and hence contributory — would be to deny to a negligent person, except against wilful misconduct, the right to immunity from being harmed by others. And, practically, however baldly the courts state the rule, it is with some such qualification that they apply it.⁶ As thus defined, moreover, A's negligence is strictly, in any legal sense, not contributory; and the rule of the last clear chance, accordingly, does not, as is frequently said,⁷ state an exception to the doctrine of contributory negligence, but serves to determine what negligence is not contributory.

Should admiralty, then, adopt a different definition of legal cause from that of the common law? Lord Blackburn's answer⁸ seems conclusive. Two vessels in a stream and two carts in a street should, in this respect, be governed by the same rules. The soundness, therefore, of the views in the principal case would seem to depend on whether they are to be taken as repudiating the last chance rule *in toto*, or only that statement of it which makes priority in time the test. The former is apparently the intention of the court; for it expressly denies the relevancy of knowledge on B's part of the situation which A's negligence has created. It is, however, a striking circumstance that not one of the cases cited bears the court out on this point; for either the colliding vessel was not aware of the presence of the other,⁹ or both vessels were aware of each other, and both continued negligently on their courses until too late to avoid the collision.¹⁰ Though no cases have

¹ 10 M. & W. 546.

² *Cayzer v. Carron Co.*, 9 App. Cas. 873.

³ See *Nashua Iron & Steel Co. v. Worcester, etc., R. R. Co.*, 62 N. H. 159, 165.

⁴ Beach, *Contrib. Neg.* § 11.

⁵ This qualification of the bald rule is substantially that suggested in 2 Thompson, *Contrib. Neg.* 1175 n.

⁶ See *O'Keefe v. Chicago, etc., R. R.*, 32 Ia. 467; 2 Thompson, *Neg.* 1157 n. and cases cited.

⁷ See *Grand Trunk R. R. v. Ives*, 144 U. S. 408, 429.

⁸ See *Cayzer v. Carron Co.*, *supra*.

⁹ The *James D. Leary*, 110 Fed. Rep. 685; The *Providence*, 98 Fed. Rep. 133; *Atlee v. Packet Co.*, 21 Wall. (U. S.) 389 (collision with a sunken pier); The *James Gray*, 21 How. (U. S.) 184.

¹⁰ The *America*, 92 U. S. 432; The *New York*, 175 U. S. 187.

been found in which the question was expressly argued, the result reached in two cases not cited tend, on the facts as found in them, to support the view in the principal case.¹¹

RECENT CASES.

BAIL — LIABILITY TO ANSWER CHARGES NOT NAMED IN BOND. — The defendant was surety on a bail bond reciting a charge of homicide and conditioned that the prisoner "appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court." The grand jury dismissed the charge of homicide, but found an indictment for perjury. Upon the prisoner's failure to appear and plead to the indictment for the latter offense, the recognizance was forfeited. *Held*, that the defendant's motion to set aside the judgment of forfeiture should be denied, since, under the bond, the prisoner is bound to answer all charges whether for the same or different crimes. Two justices dissented. *Pernetti v. People*, 91 N. Y. Supp. 210.

This decision overrules an expression of the court upon a former appeal of the case, but conforms to strong *dicta* announced in former New York opinions. *Cf. People v. Pernetti*, 95 N. Y. App. Div. 510; *People v. Gillman*, 125 N. Y. 372. Upon the theory that bail is imprisonment in the custody of the sureties instead of in that of the jailer, and reference to the criminal charge, merely description of its occasion, there seems no escape from the court's conclusion. Since the precise nature of the crime may not be known upon arrest, it is most desirable to hold the prisoner for any indictments based on the criminal act charged, but, in spite of sweeping language, it is believed the decisions rarely go farther. *Cf. State v. Ridding*, 8 Ia. An. 79; *Gresham v. State*, 48 Ala. 625. The prevailing tendency is to construe the language of recognizances as applying strictly to appearance for the criminal act charged, or a crime growing therefrom. *State v. Brown*, *16 Ia. 314. The greater difficulty in obtaining sureties to be responsible for all charges, whether arising from the prisoner's prior or subsequent conduct, would seem to make this view more nearly in harmony with the humane object of bail.

BAILMENTS — GRATUITOUS BAILMENTS — NATURE AND EXTENT OF LIABILITY OF GRATUITOUS BAILEE. — The defendants gratuitously undertook to pass certain goods of the plaintiffs through the customs. Owing to the defendants' delay, the goods were not entered until after an anticipated change in the tariff rates, whereby the plaintiffs were obliged to pay a heavy duty, for which they now seek reimbursement. *Held*, that the defendants are not liable. *Commonwealth, etc., Co. v. Weber, etc., Co.*, 91 L. T. R. 813 (Eng. P. C.).

For a discussion of the principles involved, see 17 HARV. L. REV. 126.

BILLS AND NOTES — DOCTRINE OF PRICE *vs.* NEAL — RECOVERY BY DRAWEE PAYING A FORGED DRAFT. — The plaintiff agreed to accept W.'s drafts for the price of cattle, if bills of sale signed by the vendor of the cattle should appear on the backs of the drafts. W. drew several drafts on the plaintiff, payable to a cattle dealer, wrote bills of sale on the backs, forged the cattle dealer's name, as vendor to the bills of sale, and as indorser to the drafts, and finally discounted these drafts at a bank which had no notice of any irregularity. The bank obtained acceptance and payment from the plaintiff. *Held*, that the money so paid may be recovered. *Lafayette & Bro. v. Merchants' Bank of Fort Smith*, 84 S. W. Rep. 700 (Ark.).

For a discussion of the principles involved, see 4 HARV. L. REV. 297.

BURDEN OF PROOF — QUANTUM OF PROOF IN CIVIL ACTIONS BASED ON A CRIME. — In a civil action for a felonious assault the defendant requested a ruling to the effect that the plaintiff must prove his case beyond a reasonable doubt. *Held*, that the request is properly denied. *Kurs v. Doerr*, 180 N. Y. 88.

This affirms the decision in the Appellate Division, commented upon in 17 HARV. L. REV. 198.

¹¹ The *Milligan*, 12 Fed. Rep. 338; The *Pegasus*, 19 Fed. Rep. 46. See also conflicting *dicta* in The *Daylesford*, 30 Fed. Rep. 633; The *Richmond*, 63 Fed. Rep. 1020.

CARRIERS — DUTY TO ACCEPT AND CARRY PASSENGERS — BLINDNESS AS GROUND FOR REJECTION. — The defendant's agent in accordance with the rules of the company refused to sell a railroad ticket to the plaintiff on the ground that he was blind and unaccompanied by an attendant. *Held*, that the defendant is not liable in the absence of proof that its agent knew, or had reasonable grounds to believe, that the plaintiff, though blind, was qualified to travel alone. *Illinois Central R. Co. v. Smith*, 37 So. Rep. 643 (Miss.).

The *prima facie* duty of a carrier to accept all persons who present themselves for transportation must necessarily be subject to certain limitations made for the protection of the company. In view of the rule that a passenger who is affected with a disability of which the carrier knows, or has reason to know, is entitled to greater care and attention than an ordinary passenger, it seems but fair that the company should have the right of refusing to assume this added responsibility by requiring such persons to be accompanied by attendants. *Cf. Croom v. Chicago, etc., Ry. Co.*, 52 Minn. 296; *Columbus, etc., Ry. Co. v. Powell*, 40 Ind. 37. The cases which hold that a railroad may refuse to carry drunken and insane persons rest partly upon this principle of fairness to the company, as well as upon the policy of protecting passengers from annoyance and danger. *Cf. Pittsburgh, etc., Ry. Co. v. Vandyne*, 57 Ind. 576; *Meyer v. St. Louis, etc., Ry. Co.*, 54 Fed. Rep. 116. Blindness alone would appear sufficient cause for rejection, unless the company's agent has reason to believe that the person is able to take care of himself. *Cf. Zachery v. Mobile and Ohio R. R. Co.*, 75 Miss. 746.

CONSTITUTIONAL LAW — SEPARATION OF POWERS AND DUE PROCESS OF LAW — IMPOSITION OF PENALTY BY ASSESSOR. — An Illinois statute required riparian landowners to remove all obstructions to the flow of water, and provided that the tax assessor should note any failure to do so, whereupon a drainage tax of ten dollars should be levied against each forty-acre tract as a penalty, to be collected like other taxes. The Illinois constitution provided that no person in one of the three departments of government should exercise any power properly belonging to another department, and declared that no person should be deprived of his property without due process of law. *Held*, that the statute is unconstitutional. *Cleveland, etc., R. Co. v. People*, 72 N. E. Rep. 725 (Ill.).

The primary object of taxation is raising revenue, while the present statute was meant rather to keep the streams clear by punishing failure to remove obstructions. The imposition of punishment, however, is for the judicial department, and tax assessors are not, properly speaking, judicial officers. *Cf. State v. Thorne*, 112 Wis. 81. The present case therefore seems sound: the constitution is not to be defeated by calling a penalty a tax. Attempts to do so are rare; but where a statute imposed a tax of ten thousand dollars on any lottery operating without permission, the court expressed the opinion that it was not really a tax and therefore was unconstitutional. *State v. Allen*, 2 McCord (S. C.) 55. The imposition by assessors of penalties for default in making return of taxable property or in paying taxes seems also logically a judicial function, but is upheld "on the ground of state necessity and immemorial usage." *Ex parte Lynch*, 16 S. C. 32; and see *Doll v. Evans*, 11 Am. Law Reg. (N. S.) 315. Due process of law was also wanting in the principal case, as the assessor's decision, though given without a hearing, was final. *Monticello Distilling Co. v. Baltimore*, 90 Md. 416.

CONTRIBUTORY NEGLIGENCE — THE LAST CHANCE DOCTRINE IN ADMIRALTY. — *Semble*, that, in determining questions of contributory negligence, the rule of the last clear chance is not law in admiralty. *The Steam Dredge No. 1*, 134 Fed. Rep. 161 (C. C. A., First Circ.). See NOTES, p. 537.

CORPORATIONS — DIRECTORS — DUTY TO ACT IN A BODY. — The New Jersey Corporation Act of 1898 permits incorporators to insert in the certificate of incorporation any provision creating or defining the powers of the corporation not inconsistent with the Act. The directors of the defendant company, authorized by the certificate of incorporation to act individually, purchased stock in that manner of the plaintiff. The latter sought to enforce the sale against the corporation. *Held*, that the plaintiff cannot recover, as directors must act as a unit to bind the corporation. *Audenried v. East Coast Milling Co.*, 59 Atl. Rep. 577 (N. J. Ch.).

The common law rule in regard to directors is that they can act only in a body, and any proceedings taken by them individually are of no effect on the corporation, even although a majority assent. *First National Bank v. Drake*, 35 Kan. 564. There seems to have been an opinion, more or less widespread, that the Act of 1898 abrogated this rule and allowed incorporators to authorize directors to act individually. This case, however, correctly decides that the general phraseology of the Act cannot be construed to permit such a departure from common-law principles, but must be interpreted

in accordance with them. To work so important a change, some specific enactment would be necessary.

CORPORATIONS — POWER OF CORPORATION TO PURCHASE ITS OWN SHARES.— *Held*, that a solvent corporation may purchase its own shares. *Burnes v. Burnes*, 132 Fed. Rep. 485 (Circ. Ct., W. D. Mo.).

Held, That a corporation may not purchase its shares if the effect would be to render the corporation insolvent. *In re S. P. Smith Lumber Co.*, 132 Fed. Rep. 618 (Dist. Ct., N. D. Tex.). See NOTES, p. 531.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — RIGHT OF PREEMPTION AT PAR.— The majority stockholders of a corporation in good faith voted to double the capital stock, and sell the shares to a stranger for four times their par value. *Held*, that a dissenting stockholder has no right to purchase at par a portion of such new stock, proportionate to his share of the original stock. *Stokes v. Continental Trust Co.*, 91 N. Y. Supp. 239.

Contrary to the present case, stockholders have almost everywhere been given the right of preemption at par of a part of the increase of stock, proportionate to their original shares. *Cunningham's Appeal*, 108 Pa. St. 546. But this rule is not applied to stock issued in payment for property, nor to old stock, bought in by the corporation, and reissued. *Meredith v. New Jersey, etc., Co.*, 55 N. J. Eq. 211; *State v. Smith*, 48 Vt. 266. It is professedly allowed, to preserve each stockholder's influence in the corporation; but where a definite amount of new capital must be realized, this is accomplished equally well by allowing him the right to purchase only at the market value, since a smaller issue of stock would then be necessary. And the general rule practically compels corporations which wish to increase their stock, but have nearly reached their legal limit, to declare a dividend of the difference between the market value of the new stock and par; for those stockholders unable to subscribe can sell their right. See *Jones v. Concord, etc., R. R.*, 67 N. H. 234. This would tend to prevent corporations from increasing their stock and developing their resources. In Indiana the rule has been changed by statute. See *Ohio, etc., Co. v. Nunnemacher*, 15 Ind. 294.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — VESTING OF RIGHTS IN TRUSTEES — A majority of the stock in a New Jersey corporation was transferred to an English corporation for voting purposes. *Semle*, that a voting trust is contrary to public policy and void. *Warren v. Pim*, 59 Atl. Rep. 773 (N. J., Ct. App.).

A reorganization committee, vested with title to stock under a trust agreement, was given power to make a final interpretation thereof, and to supply all defects and omissions. *Held*, that the committee cannot be made the final judge of its construction. *Industrial & General Trust v. Tbd*, 180 N. Y. 215. See NOTES, p. 533.

CRIMINAL LAW — DEFENSES — JUSTIFICATION UNDER PRIOR DECISION OF COURT.— To an indictment of a tenant under a statute for removing crops without coming to an agreement with the landlord, the Supreme Court of the state held it a good defense that the balance of account was in favor of the tenant. For removal of crops under similar circumstances after this decision another defendant was convicted. *Held*, that the previous decision is incorrect, but that this defendant may have a new trial on the basis of that decision. *State v. Bell*, 49 S. E. Rep. 163 (N. C.).

A decision overruling former decisions does not change the law but gives revised evidence of what the law has always been. *Falconer v. Simmons*, 51 W. Va. 172. Consequently its application to transactions after the former decisions is not objectionable strictly as *ex post facto* nor as a law impairing contract obligations. *Central Land Co. v. Laidley*, 159 U. S. 103. But as it is practically open to the same objections, courts will not, in interpreting statutes, apply the new ruling to the prejudice of contract or property rights apparently acquired under the old. *Farrior v. New England, etc., Co.*, 88 Ala. 275. This is not extended to decisions under the common law. See *Ray v. Western, etc., Gas Co.*, 138 Pa. St. 576, 591. In criminal law reliance on former decisions should, as in the principal case, be a justification, not under mistake of law, but under the spirit in which *ex post facto* laws are prohibited—that acts which the court gave reason to suppose innocent should not be punished by a law which from a business point of view did not then exist. But obviously this policy does not apply to crimes involving moral turpitude. The only case found in point so decided. *Lanier v. State*, 57 Miss. 102.

DIVORCE — ALIMONY — PAYMENT AFTER DEATH OF HUSBAND.— The plaintiff was granted a divorce from her husband with alimony during her life, secured by a mortgage executed by her husband and the defendant. The plaintiff sued to recover

alimony accruing since her husband's death. *Held*, that the plaintiff may recover, since the obligation to pay alimony is a charge on the security although the personal obligation does not survive. *Wilson v. Hinman*, 99 N. Y. App. Div. 41.

Alimony at common law becomes payable only during the joint lives of the parties, and cannot be granted to continue after the death of the husband. *Maxwell v. Sawyer*, 90 Wis. 352. By statute, however, a court may be empowered to grant it for the life of the wife, continuing as a binding obligation against the husband's estate, if she survive him. *Stratton v. Stratton*, 77 Me. 373. The intermediate view adopted by the New York court, that alimony survives only where security is required and then only as a charge on the security, seems erroneous; if the personal obligation is gone, the mortgage is discharged also. *Cf. Williams v. Thurlow*, 31 Me. 392. Further, the earlier decision relied on in the principal case held unqualifiedly that a court may grant alimony payable after the husband's death, laying no stress on the giving of security. *Burr v. Burr*, 10 Paige (N. Y.) 20, 37. A later New York case reached just the contrary decision, holding that alimony could not be so granted. *Field v. Field*, 15 Abb. New Cas. 434. On principle, the obligation to pay alimony either ceases on the death of the husband, being purely personal, or survives against his estate whether security be given or not.

EJECTMENT — INTERFERENCE WITH EASEMENT — RAILROAD RIGHT OF WAY. — The plaintiff, a railroad company, acquired lots for railway purposes under condemnation proceedings, and the defendant, not claiming under the original owner, built thereon. *Held*, that the plaintiff has an action of ejectment, although it enjoyed only an easement. *Kansas, etc., Ry. Co. v. Burns*, 79 Pac. Rep. 238 (Kan.).

Unless railways are given a fee by statute or charter in lands acquired under eminent domain, they are commonly held to take only an easement. *Blake v. Rich*, 34 N. H. 282. Ejectment, being a possessory action, does not properly lie for an incorporeal right such as an easement. *Northern Turnpike Road Co. v. Smith*, 15 Barb. (N. Y.) 355. But the action has sometimes been allowed for such easements as city streets and parks, which involve exclusive control of a portion of the servient tenement. *San Francisco v. Grote*, 120 Cal. 59. Similarly, a railway company has been said to have a right to an actual possession of the surface, sufficient to support ejectment. *Tennessee, etc., R. R. Co. v. East Alabama Ry. Co.*, 75 Ala. 516. Granting that the railway's title to the soil is no more than an easement, it would follow logically that ejectment should have been denied and the plaintiff remitted to the ordinary remedies for obstruction of easements. The anomalous doctrine of the case must then be justified by the necessity which requires a summary remedy, and explained by the tendency to break down the rigid bounds which characterized forms of action under the common law. It seems, however, that such an extension would be better accomplished by legislation.

EMINENT DOMAIN — WHAT PROPERTY MAY BE TAKEN — SITE FOR STEAM POWER-HOUSE FOR ELECTRIC POWER COMPANY. — A company formed to manufacture, transmit, and sell electricity brought an action to condemn land for the use of its wires. *Seem*, that it might condemn land for a steam power-house. *Rockingham, etc., Co. v. Hobbs*, 72 N. H. 531. See NOTES, p. 528.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY — RIGHT LOST BY LACHES. — The plaintiff as administrator sought an order to sell certain real estate of the deceased, incumbered by dower, for the payment of debts. At the time of the death of the intestate the property was practically worthless, but after nineteen years had recently become valuable. *Held*, that the plaintiff is barred by laches. *Graham v. Brock*, 72 N. E. Rep. 825 (Ill.).

The question of laches is one of negligence. It does not depend, as does the running of a statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon the fact that, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. *Townsend v. Vanderwerker*, 160 U. S. 171. In this case the plaintiff refrained from petitioning for the sale of the land so long only as it was worthless. This would appear to be a sufficient explanation of his previous delay in bringing suit. On principle and on authority the decision seems erroneous, and is apparently irreconcilable with an earlier case in the same State. *Cf. Judd v. Ross*, 146 Ill. 40; *Conger v. Cook*, 56 Ia. 117.

EXTRADITION — INTERNATIONAL EXTRADITION — APPLICATION OF GAYNOR AND GREENE FOR HABEAS CORPUS. — The defendants, charged with the commission of theft in the United States, had taken up their residence at Quebec. In accordance

with the extradition arrangements between the United States and Canada, an application for their arrest upon an information charging theft was made to an extradition commissioner and a warrant was duly issued. Upon arrest they obtained a writ of *habeas corpus*; but on the hearing they were remanded into custody. Upon a writ of *habeas corpus* issued by another judge, however, they were discharged. *Held*, that the latter judgment must be reversed. *United States v. Gaynor*, 21 T. L. R. 254 (Eng., P. C.).

The division of the province into separate judicial districts makes it doubtful whether or not the first judge had jurisdiction. If he did, his decision was, under a Canadian statute, a bar to the issue of the second writ, as *res judicata*. But without considering whether the second judge was warranted in assuming jurisdiction, it seems clear that his discharge of the prisoners was erroneous. The only question before him was the lawfulness of the confinement. That it was lawful would seem to admit of no doubt. *Cf. Ex parte Gillespie*, 7 Quebec Q. B. 422. The commissioner was an official authorized by statute to order an arrest anywhere within the province upon a complaint alleging an offense named in the extradition treaty, and either at once or on remand to investigate the case. *Cf. Extradition Act* (Rev. St. Can., c. 142); see *Ex parte Seitz*, 8 Quebec Q. B. 345, 351, 352. In pursuance of his duty, he had ordered the defendants into custody to await a hearing, which would take place before him in due course. As theft was an offense within the treaty, it follows that the commitment was lawful.

GARNISHMENT — EXEMPTION OF WAGES — ESTOPPEL TO CLAIM STATUTORY EXEMPTION. — The plaintiff, at the request of the defendant, his debtor, garnished the defendant's employer. The defendant then moved for a release of the money attached, on the ground that it was exempt by statute as the earnings of the head of a family. *Held*, that the defendant is estopped to claim the exemption. *Dowling & Allgood v. Wood*, 101 N. W. Rep. 113 (Ia.).

A contract to waive exemption as against a particular debt if made when that debt is incurred is invalid, since to permit such contracts would defeat the operation of the exemption laws. *Kneetle v. Neucomb*, 22 N. Y. 249. Some courts, going further, have held that since the exemption was intended to benefit the debtor's family as well as himself, a waiver by him alone should not be recognized, for such recognition would defeat one purpose of the exemption laws. *Denny v. White*, 2 Cold. (Tenn.) 283. But by the weight of authority, while the principle first stated is admitted, the right of exemption is regarded as personal to the debtor, and as such, irrespective of the purpose with which it was given, is considered dependent for its exercise upon his will. *Charpentier v. Bresnahan*, 62 Mich. 360. If waiver is allowed, estoppel must be permitted, for acts falling short of estoppel may yet be a waiver. *Bramble v. State*, 41 Md. 435. It is somewhat difficult, on the meager facts reported, to find in the present decision all the elements of estoppel; but the result seems sound, since there was apparently at least a waiver of the exemption by the defendant.

IMPROVEMENTS — COMPENSATION — COLOR OF TITLE. — In an action to recover land, the defendant, who was in possession under a bond for title from a third person, claimed a judgment for the value of the improvements made by him upon the land, under a statute permitting recovery for such improvements where made by one believing himself to be the owner either in law or equity, under color of title. *Held*, that there is not sufficient color of title to satisfy the requirements of the statute. *Beasley v. Equitable Securities Co.*, 84 S. W. Rep. 224 (Ark.). See NOTES, p. 534.

INSURANCE — CONSTRUCTION OF PARTICULAR PHRASES — CHANGE IN "INTEREST, TITLE, OR POSSESSION." — A policy of fire-insurance provided that it should be void if any change should take place, by legal process or otherwise, in "interest, title or possession," excepting change of occupants without increase of hazard. Subsequently the insured was adjudged bankrupt and the appointment of a receiver over his property was entered in the referee's record. A fire destroyed the premises, following which the receiver was formally appointed and later made assignee in bankruptcy. *Held*, that the policy was not void at the time of the loss. *Fuller v. Jameson*, 98 N. Y. App. Div. 53.

After adjudication the bankrupt seems to hold his property under some undefined fiduciary relation, sometimes described as a trust. *Rand v. Iowa Central Ry. Co.*, 96 N. Y. App. Div. 413; *cf. 18 HARV. L. REV.* 63. Interest, as referred to in the policy, has been construed to include equitable interest. *Skinner, etc., Co. v. Houghton*, 92 Md. 68. Perhaps the change of interest was here immaterial, if, as the court says, the bankrupt's right to deal with his property was merely suspended and he still retained the interest desired as an incentive to vigilance and care. Had the receiver been formally

appointed before the fire, it may be that his possession, unless it came within the exception stated, would have avoided the policy. But see *Keeney v. Home Insurance Co.*, 71 N. Y. 396. That, under the Bankruptcy Act, title vests in the assignee upon formal appointment, as of the day of adjudication, is not conclusive against the decision. Such a fiction should not operate to the injury of third persons, as regards property not existing when the assignee qualifies. *Small v. Westchester, etc., Co.*, 51 Fed. Rep. 789, 795; *Fuller v. New York, etc., Co.*, 184 Mass. 12. The court, however, to avoid forfeiture and to protect creditors during the interim, has construed the policy very strongly against the company.

INTERSTATE COMMERCE — CONTROL BY STATES — ORIGINAL PACKAGES. — A state statute imposed a tax of three hundred dollars per annum on persons selling cigarettes. *Held*, that when pasteboard boxes, each containing ten cigarettes, and bearing a revenue stamp, are imported loose, the original package rule does not exempt the seller of such a package from taxation. *Cook v. County of Marshall*, 25 Sup. Ct. Rep. 233. See NOTES, p. 530.

JUDGMENTS — FOREIGN JUDGMENTS — FULL FAITH AND CREDIT UNDER THE FEDERAL CONSTITUTION. — The plaintiff sued his debtor in a Missouri court and garnisheed the defendant. Pending this proceeding, the defendant secured a decree in Missouri setting aside the contract between him and the plaintiff's debtor, and declaring that nothing was due the debtor. The latter then sued the defendant in New Jersey on two counts, — on the express contract, and for work and labor. The defendant pleaded the Missouri judgment to the first count and a general denial to the second. Judgment on the latter was given for the debtor and was paid. The plaintiff in the original proceeding then sought to secure judgment against the defendant on the basis of this New Jersey judgment, and the latter neglected to plead payment. *Held*, that since the judgment of the New Jersey court did not give full faith and credit to the Missouri judgment, the Missouri court need not give credit to that New Jersey judgment, and the plaintiff cannot recover. *Grimm v. Barrington*, 84 S. W. Rep. 357 (Mo., St. Louis Ct. App.).

This case seems questionable. The Missouri judgment was an affirmative defense similar to *res adjudicata*, and therefore, not having been pleaded to the second count in the New Jersey suit, the judgment on that count was correct. And no defense which with diligence might have been made in the suit can be an answer to an action elsewhere on the judgment. *Snow v. Mitchell*, 37 Kan. 636. But granting that the New Jersey court erred, by the general rule full credit must be given the judgment of a sister state, except when rendered by a court without jurisdiction, or when a collateral attack would be valid in that state. See *Barras v. Bidwell*, 3 Woods (U. S.) 5. Mere irregularity such as affords ground for direct appeal is no defense. *Milne v. Van Buskirk*, 9 Ia. 558. By the better view the error here, if any, would appear to have been ground rather for appeal than for collateral attack, and no appeal having been taken, Missouri was bound to give credit to the judgment. *Ex parte Boenninghausen*, 91 Mo. 301; *Buckmaster v. Carlin*, 4 Ill. 104.

LIMITATION OF ACTIONS — ACCRUAL OF ACTION — DISTRICT WARRANTS. — The plaintiff held warrants of a reclamation district drawn upon the county treasurer but not paid for want of funds, which it was within the power of the trustees of the district to provide by levying an assessment. After the lapse of more than the statutory period from the date of approval of the warrants, the plaintiff sued. *Held*, that as the plaintiff might have brought *mandamus* at any time to compel the raising of funds, he is barred. *San Francisco Savings Union v. Reclamation District*, 79 Pac. Rep. 374 (Cal.).

In assigning this ground for its decision the court takes a position opposed to that adopted in the case of *Barnes v. Turner*, 78 Pac. Rep. 108 (Okla.), which was adversely criticised in 18 HARV. L. REV. 230.

MALICIOUS PROSECUTION — PRELIMINARY INJUNCTION AS EVIDENCE OF PROBABLE CAUSE. — *Held*, that an injunction *pendente lite*, granted upon affidavits, is *prima facie* evidence of probable cause, so that, if in a suit for malicious prosecution it is not overcome by other evidence, a nonsuit is proper. *Burt v. Smith*, 181 N. Y. 1.

For a discussion of the holding in the lower court which is here reversed, see 17 HARV. L. REV. 61.

MORTGAGES — EQUITABLE MORTGAGES — RIGHT TO RENTS AND PROFITS. — *Held*, that an equitable mortgagee who has received rents from a tenant of the equitable mortgagor, cannot be compelled to refund them at the suit of the tenant. *Finch v. Tranter*, [1905] 1 K. B. 427.

In jurisdictions where a mortgagee holds legal title, the estate of the mortgagor is peculiar. He is not a tenant at will, for he is not entitled to emblements. See *Moss v. Gallimore*, 1 Doug. 279, 283. Nor is he like a receiver, for he need not pay rent, nor account to the mortgagee for rent received. *Ex parte Wilson*, 2 Ves. & B. 252. But the mortgagee may, by ejectment, obtain possession of the land, or require a tenant to pay him the rents. In dealing with the equitable mortgagee, equity follows the law. Accordingly, until he gets possession, the equitable mortgagee has no right to the rents. *Ex parte Bignold*, 4 Deac. & Ch. 259. He would, however, be entitled to rents and profits flowing from his own lawful possession. *Re Gordon*, 61 L. T. R. N. S. 299. And if he has received the rents, the mortgagor or his assignee in bankruptcy cannot take them from him. *Sumpter v. Cooper*, 2 B. & Ad. 223. Nor should the tenant in the principal case get any relief, for he has a good equitable defense to an action by the lessor, and paid with knowledge of all the facts, being mistaken only as to the law. See *Higgs v. Scott*, 7 C. B. 63.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — THE LAND AS DEBTOR AND THE MORTGAGOR AS SURETY. — A father made a deed of land covered by a mortgage as a gift to his daughter, and covenanted in the deed to pay the mortgage debt. After the father's death, the mortgage was foreclosed, and the daughter sought to recover from her father's estate the amount which her land was taken to pay. By statute, a deed did not require a seal. *Held*, that the plaintiff cannot recover. *Fischer v. Union Trust Co.*, 20 Detroit Leg. N., No. 132, p. 2 (Mich., Sup. Ct., Dec. 30, 1904).

Since the covenant to pay the mortgage, being gratuitous, was unenforceable, the plaintiff stood no better than a grantee subject to a mortgage. *Conrad v. Manning's Estate*, 125 Mich. 77. On foreclosure such a grantee is remediless. Notwithstanding this, the plaintiff contended for a right of subrogation, on the ground that her land was surety for the debt. There are strong *dicta* that on a grant of land subject to a mortgage, the land does not become the principal debtor, and the mortgagor the surety, at least, so that giving time against foreclosure will discharge the mortgagor from liability. See *Shepherd v. May*, 115 U. S. 505; *Chilton v. Brooks*, 72 Md. 554. But since the grant was subject to the mortgage, the land should bear the debt; and if the mortgagor pays, he should have subrogation against the land. If the creditor by giving time defeats this present right of subrogation, the mortgagor should be discharged. So by the better view, the land is held to be the principal debtor and the mortgagor a surety. *Murray v. Marshall*, 94 N. Y. 611; *Bunnell v. Carter*, 14 Utah 100. It seems clear, therefore, that inasmuch as the debtor cannot be subrogated against his surety, the principal case is sound.

NEGLIGENCE — DUTY OF CARE — DEGREES OF NEGLIGENCE. — *Held*, that it is error to enter judgment upon a verdict based upon the inconsistent grounds of both gross and ordinary negligence, for "gross negligence" implies wilful misconduct. *Ridout v. Winnebago Traction Co.*, 101 N. W. Rep. 672 (Wis.). See NOTES, p. 536.

POWERS — EXECUTION — EFFECT OF APPOINTMENT IN ACCORDANCE WITH BARGAIN. — The donee of a power of jointuring exercised it in fulfilment of a contract whereby he received fifty pounds from his wife. *Held*, that a court of equity will not set aside the appointment. *Saunders v. Shafte*, W. N. 203 (Eng., C. A., 1904).

If one who has an exclusive power of appointment to his children appoint to one of them upon a bargain previously made with that child, equity will relieve against the appointment at the suit of the one taking in default thereof. *Daubeny v. Cockburn*, 1 Mer. 626. And if the donee of a power of jointuring execute it upon an agreement that he shall have the benefit of part of the jointure, the execution, so far as it is in his favor, will be set aside. *Lane v. Page*, Amb. 233. The present case differs from that first cited, since the wife was the only possible appointee, and it is distinguishable from the second in that the power was completely exercised. In taking advantage of these distinctions and in declaring the present appointment good, the case, which expressly overrules an earlier decision, probably settles the law of England on this precise question. *Baldwin v. Roche*, 5 Ir. Eq. 110; *Whelan v. Palmer*, 39 Ch. D. 648, *contra*, overruled.

PRESUMPTIONS — APPLICATION OF THE PRESUMPTION THAT A WOMAN OF ADVANCED YEARS IS INCAPABLE OF CHILDBEARING TO QUESTIONS OF MARKETABLE TITLE. — Land was devised to the vendor for life, with remainder to her son in fee, subject to a devise over to the children of M., a married woman, in the event of the death without issue of the vendor's son. The son was living and had had issue, and he and the existing children of M. had conveyed their interests to the vendor. M. was now a widow and fifty-four years of age. *Held*, that the court, acting upon the

presumption that there will be no further issue of the body of M., will declare that the vendor can make a good title in fee simple. *In re Tunning and Weber*, 25 Can. L. T. (Occasional Notes) 38 (Ont., Ct. App.).

For the purpose of determining questions of remoteness arising under the rule against perpetuities, men and women are both deemed capable of having issue as long as they live. *See v. Audley*, 1 Cox, 324. Moreover, the courts will not make use of the presumption that a woman of advanced years is past the age of childbearing if the effect is to deprive a living person of a possible interest. *In re Hocking*, [1898] 2 Ch. D. 567. This presumption has, however, a well-established place in the law, as is shown by several cases in which courts have directed the payment of funds to parties whose claims were dependent upon it. *Leng v. Hodges*, Jac. 585. Since, although not of universal application, it is a presumption not unknown to the law, it would seem that it is properly applied to cases involving the question of marketable title, that being a matter upon which mathematical certainty is not required, moral certainty being regarded as sufficient. *Lyddale v. Weston*, 2 Atk. 19. The principal case has the support of what authority directly in point has been found. *Browne v. Warnock*, L. R. 7 Ir. Ch. D. 3.

PRESUMPTIONS—NATURE AND SCOPE—RELATION OF PRESUMPTIONS TO EVIDENCE.—In an action upon a life insurance policy the jury were instructed that a presumption of law that the declarations of the deceased in his application were true, had probative value, so that if the evidence upon the point was evenly balanced, they should find for the plaintiff, upon whom lay the burden of proof. *Held*, that the instruction is erroneous. *Vincent v. Mutual, etc., Life Ass'n*, 58 Atl. Rep. 963 (Conn.).

Connecticut has already held that the presumption of innocence is not evidence in criminal trials, but only imposes the burden of proof beyond a reasonable doubt. *State v. Smith*, 65 Conn. 283. And upon the probative value of presumptions in civil cases the present decision, in harmony with this position, expressly overrules an earlier case. *Barber's Appeal*, 63 Conn. 393. In consequence the state is brought into agreement with the best text-writers and authorities. THAYER, PREL. TREAT. EV. 313, 551; 1 GREENLEAF, EV., 16 ed., § 34, n. 1. A presumption is not evidence, but a legal rule or conclusion springing, in many instances, from evidential facts, which throws upon the party against whom it operates the burden of coming forward with evidence sufficient to overcome or destroy it. Once destroyed, it is, as a presumption, incapable of being measured or weighed against actual evidence. The court attributes its change of front to the clear, convincing, and exhaustive contributions of Professor Thayer to the subject of legal presumption, in a note to which he cited and criticised the case now overruled. THAYER, PREL. TREAT. EV. 564.

QUASI-CONTRACTS—RIGHTS ARISING FROM MISTAKE OF FACT—RECOVERY OF OVER-PAYMENT BY TRUSTEE.—A trustee, who was one of the beneficiaries of the trust, through mistake in his accounts paid the other beneficiaries more than their shares of the income, and died. *Held*, that his executor may not recover the over-payments or balance them by retention of future income. *In re Horne*, [1905] 1 Ch. 76.

Generally money paid under mistake of law cannot be recovered. *Bilbie v. Lumley*, 2 East 469; *contra*, *Mansfield v. Lynch*, 59 Conn. 320. But if a payment is by a trustee it may be recovered, or balanced by retention of future payments, for the benefit of the true beneficiary, since the wrongful holder of trust property should make reparation to the innocent *cestui*. *Dibbs v. Goren*, 11 Beav. 483. In the principal case the beneficiary was not allowed to recover, for his dual legal position could not alter the fact that he himself was as much to blame for the incorrect payment as if there had been no trust. This would probably be sound if, as the court seemed to think, it were a mistake of law. But apparently it was not, but simply a mistake as to what the shares were in fact. In such a case even the party in fault may recover. *Appleton Bank v. McGilroy*, 4 Gray (Mass.) 518. The court's argument from inconvenience to the defendant seems inapplicable in the absence of evidence that change of his circumstances would make repayment inequitable. The burden to show this was on the defendant. *Walker v. Conant*, 65 Mich. 194.

QUIETING TITLE—REMOVAL OF CLOUD—WHAT CONSTITUTES A CLOUD.—A corporation filed a bill to quiet title. It did not appear that the defendant's claim amounted to more than a claim on an oral contract. *Held*, that the plaintiff may obtain a decree. *Morgan & Co. v. Palmer*, 79 Pac. Rep. 476 (Wash.). See NOTES, p. 527.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY—ENFORCEMENT OF RESTRICTIONS: WHO MAY ENFORCE.—*Held*, that owners of subdivisions of a parcel

of land, subject to a restrictive covenant, deriving their respective portions through mesne conveyances without any restrictions, cannot enforce the original agreement against one another. *Lewis v. Ely*, 100 N. Y. App. Div. 252. See NOTES, p. 535.

STATUTES — INTERPRETATION — STATUTE PERMITTING ACTION IN FORMA PAUPERIS. — A federal statute provided that a citizen might "commence and prosecute to conclusion any such suit or action" without giving security if he filed an affidavit of his poverty. A verdict being rendered against the plaintiff, she sued out a writ of error from the Circuit Court of Appeals, and, on the clerk's refusing to docket the case until she deposited security for the payment of the costs, she petitioned that she be allowed to prosecute the cause *in forma pauperis*. The case was certified to the Supreme Court for decision. *Held*, that her petition be denied. *Bradford v. Southern Ry. Co.*, 195 U. S. 243.

The present decision is the result of a strict construction of the statute; and is the logical outcome of a previous case in which it was decided that this statute does not apply to writs of error from the Supreme Court. *Galloway v. Fort Worth Bank*, 186 U. S. 177. The merits of the decision seem to depend upon the relative desirability of a strict or liberal construction of the statute. The lower federal courts have inclined to apply the Act to writs of error in order to enable the poor to avail themselves of all legal remedies. *Cf. Reed v. Pennsylvania Co.*, 111 Fed. Rep. 714; *contra, The Presto*, 93 Fed. Rep. 522. And in this position they have the support of several of the state courts. See *Falkenburgh v. Jones*, 5 Ind. 296, 299. On the other hand, the dislike of allowing litigation at the expense of others has induced certain courts to take the opposite position. See *Moore v. Cooley & Blackman*, 2 Hill (N. Y.) 412. While there is very great weight in this argument, yet it might be maintained that Congress, in aiding the poor to secure their legal rights, intended a complete rather than a partial remedy.

TRIAL — VERDICTS — UNANIMITY OF JURY UPON GROUNDS OF VERDICT. — In an action for injuries resulting from a collision with the defendant's street-car the plaintiff alleged several respects in which the operation of the car had been negligent. Instructions requested by the defendant that nine of the jury, the number necessary for a verdict in Missouri, must agree upon one or more of the specifications of negligence before finding for the plaintiff, were refused. *Held*, that there is no error. *Holden v. Missouri Rd. Co.*, 84 S. W. Rep. 133 (Mo., St. Louis Ct. App.); *Wacker v. St. Louis Transit Co.*, 84 S. W. Rep. 138 (Mo., St. Louis Ct. App.).

By a Missouri statute the jury are required in certain classes of suits, including the cases under consideration, to render a general verdict. Mo. Rev. St. c. 8, § 721. As they cannot be expected to agree upon all the varied issues of fact involved, how far unanimity shall be required upon the grounds of this verdict, if at all, would seem a question of degree. It may be objected that unless there is agreement upon such fundamental allegations as those in the principal cases, there is no real unanimity and no common basis for a verdict. *Cf. Parrott v. Thacher*, 9 Pick. (Mass.) 426; *Biggs v. Barry*, 2 Curt. (U. S.) 259. There is here, however, but one cause of action and one main issue, the negligence of the defendant. *Brownell v. Pacific Rd. Co.*, 47 Mo. 239. Therefore the court reasons with fairness that to give the requested instruction would be to require indirectly a special verdict, and that the mental operations by which the general verdict is reached are not for the court to control. See *Murray v. New York, etc., Co.*, 96 N. Y. 614.

TRUSTS — RESULTING TRUSTS — EFFECT OF GRANT FOR ILLEGAL PURPOSE. — The plaintiff, in order to escape taxation, fraudulently took certain securities for loans in his son's name. The son subsequently discovered the fact and took possession of the securities. The plaintiff brought a bill in equity praying that the securities be impressed with a trust for him. *Held*, that a resulting trust arises in favor of the plaintiff. *Monahan v. Monahan*, 59 Atl. Rep. 169 (Vt.).

As a general rule, where parties are *in pari delicto* neither can recover against the other. *Taylor v. Chester*, 4 Q. B. 309. At law, however, the plaintiff is not barred if he does not have to disclose his own wrong in the pleadings. See *Swan v. Scott*, 11 S. & R. (Pa.) 155. In equity it is doubtful if this limitation would apply, if the plaintiff's wrong appeared in the presentation of the case, because equity will not aid one who does not come with clean hands, where his wrong was part of the same transaction. *Cudman v. Horner*, 18 Ves. Jun. 10. On this ground the principal case seems wrong. A stronger objection may be urged. Where a parent pays the purchase money, but takes title in the child's name, a presumption arises that the transaction was intended as an advancement to the child. *Respass v. Jones*, 102 N. C. 5. Here the plaintiff could rebut the presumption only by evidence that he intended the transaction as a

device to evade taxation. Where proof of his illegal purpose is essential to the establishment of his case it seems clear that equity should not aid him. *Cf. Roberts v. Lund*, 45 Vt. 82.

TRUSTS—VALIDITY—CESTUI TO BE DETERMINED BY TRUSTEE.—A fund was bequeathed to the Bishop of Utah on trust to erect therewith a church and rectory at such place as the bishop should select. *Held*, that the trust is invalid for indefiniteness. *Mount v. Tuttle*, 99 N. Y. App. Div. 433. See NOTES, p. 529.

WILLS—CONSTRUCTION—IMPLIED DEVISE.—A testator willed that after the death of his wife his land should go to two of his four co-heiresses. *Held*, that during the life of his widow the land descends as intestate property. *In re Willatts*, 21 T. L. R. 194 (Eng., Ch. D.).

A devise or bequest to the testator's heir, or next of kin after the death of A, gives A a life estate by implication. Y. B. 13 Hen. VII. 17, pl. 22; see *Macy v. Sawyer*, 66 How. Pr. (N. Y.) 381. But where the gift is to one other than the testator's heir or next of kin after the death of A, the estate during A's life goes to the testator's heir or legal representatives. *Stevens v. Hale*, 2 Drew. & Sm. 22. The decision in the latter case is a result of the ordinary principle that property undisposed of by will passes as intestate property. Since, however, a strict application of this principle to the former case would make the testator practically intestate as to this property, the courts construe the will as giving a life estate to A by implication; for otherwise the clause would be a nullity. *Cf. BACON, USES, ROWE'S ED.*, 223 n. But in the principal case there is no need for such a construction, as the ordinary one would not result in intestacy. The decision, then, appears correct, and avoids any unfortunate litigation over what the testator might have meant but did not say.

WILLS—NUNCUPATIVE WILLS—MEANING OF PHRASE "LAST SICKNESS."—A statute gave validity to a "verbal will made in the last sickness" of the testator. The deceased, during an illness which he expected would prove fatal, gave verbal directions for the disposition of his property. At that time he had the opportunity to make a written will; and his death, though from the same illness, did not occur until sixteen days later. *Held*, that the directions constitute a valid verbal will. *Baird v. Baird*, 79 Pac. Rep. 163 (Kan.).

The Statute of Frauds declared nuncupative wills invalid unless "made in the last sickness of the deceased." In most jurisdictions identical statutory phrases have been construed as meaning *in extremis*. *Prince v. Hazleton*, 20 Johns. (N. Y.) 502; *Carroll v. Boulham*, 42 N. J. Eq. 625. That the testator at or after the time of speaking the testamentary words had a reasonable opportunity to execute a written will, is held fatal to the validity of the verbal one. *Scarfe v. Emmons*, 84 Ga. 619. Another interpretation considers the requirement satisfied if the deceased spoke the words at any time during the particular illness which resulted fatally and when impressed with the probability of death. *Harrington v. Stees*, 82 Ill. 50; *Nolan v. Gardner*, 7 Heisk. (Tenn.) 215. The former position seems preferable. In order that the safeguards of a written will may not be too easily avoided, it would seem that nuncupative wills should take effect only if made *in extremis*; and whether or not one was so made should depend on the extent of the opportunity to make a written will rather than on the precise length of the interval before death. The testator's anticipation of death should be material only as evidence of the testamentary intention.

WITNESSES—COMPETENCY—CONTRACT WITH DECEASED.—The New York Code provided that a person interested in the event of the suit or a person from, through, or under whom such interested person derived his interest should not testify against the executor, as to any personal transaction with the deceased. Notwithstanding this provision the mother of an illegitimate son was allowed to testify, in an action by the child, to a promise, made to her, by the deceased father, to leave one hundred thousand dollars to her son. *Held*, that this is error. *Rousseau v. Rouss*, 180 N. Y. 116.

It is a doctrine of long standing in New York that the beneficiary, under a contract between third parties, cannot sue unless the promisee is interested in his recovery. *Vrooman v. Turner*, 69 N. Y. 280. Such a suit is allowed, however, where the promisee's interest is no greater than that of the mother in the principal case. *Cf. Todd v. Weber*, 95 N. Y. 181. But such an interest is not enough to debar one from testifying as a "person interested" under the Code. *Cf. Connelly v. O'Conner*, 117 N. Y. 91. This is a peculiar and somewhat confusing gradation of interest. The ground now taken by the court is that the child's interest was derived through the mother, as she furnished the consideration which made the promise binding. This denies the simple view that an interest cannot be derived from one by whom it was never held; and re-

verses two prior decisions on the same point. *Bouton v. Welch*, 170 N. Y. 554; *Soduil v. Kidd*, 64 Hun (N. Y.) 585. It would seem unfortunate that these latter holdings have been disturbed, for, even if the question were *res integra*, they would appear to furnish the more reasonable construction of the Code.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

RESERVED POWER OF STATE TO CONTROL CORPORATION. — The theoretical basis of the state's power to alter or modify corporate charters, the express reservation of which has been common since the decision of the Dartmouth College case, is analyzed in a series of three articles in the American Law Register. *The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation*, by Horace Stern, 53 Am. L. Reg. 1, 73, 145 (Jan.-Mar. 1905). The author asserts that if his contentions be correct, "almost the entire law on the subject of the control of the state over corporations must be rewritten." He attacks the decision in the Dartmouth College case, and would prefer to rest it upon a ground different from that which the court assigned as the basis for its conclusion. The line of argument pursued may be briefly summarized as follows: The incorporators to whom a charter is issued have previously formed among themselves a contract analogous to that of a partnership. The terms of this agreement prescribe the scheme of organization and membership. Its validity is independent of the legislative act of incorporation. Whether or not the charter which confers the franchise of incorporation is a contract between the state and the incorporators, any statute which impairs the obligation of this contract previously made between the incorporators is unconstitutional. The act of the legislature of New Hampshire in amending the charter of Dartmouth College, so as to increase the number of trustees, violated the preliminary contract by which the original incorporators agreed among themselves that the number of trustees should be twelve and no more.

The writer proceeds to point out that under the view generally accepted since Marshall's famous opinion, the state, as a contracting party to the charter, ought to be regarded as acting in a private, not a sovereign, capacity. Likewise the power reserved by statute to amend or repeal a charter is to be considered "a power reserved by the state as a private party to a contract, and not as a sovereign agency of government." The legal position of the state with reference to the charter therefore becomes identical with that of a private individual who in his contract has reserved the right to rescind at his pleasure.

The distinction between these two contracts — one between the state and the incorporators, the other between the incorporators themselves — should, in the author's opinion, determine the limits of the revoking power of the state. On the one hand, the state should be able to alter or revoke all rights conferred in the charter, including the franchise to exist as a corporation. It should have the right to impose any condition it chose upon the corporation, and to provide that compliance therewith should be the price of the continued enjoyment of the franchise. Thus the state should have power to recall the right to regulate its rates conferred by charter upon a public service corporation, and to refuse to allow it to exact reasonable charges or any charges at all for its services. But on the other hand, the state should not be able to deprive the corporation of its property or rights which are not conferred by the charter. The state, not being party to the contract of the incorporators *inter se*, should be unable to reserve or exercise a power to alter such contract; hence the internal management of the corporation and the rights of its members, as determined by the contract made prior to the act of incorporation, it should not be within the power of the state to modify.

STATE CORPORATION AS PARTY IN FEDERAL COURTS. — The increasing frequency with which state corporations are appearing as parties in the federal courts calls forth a timely and suggestive expression of opinion from the Hon. Francis E. Baker, Judge of the Seventh Circuit Court of the United States. *The State Corporation as a Party in Federal Courts*, 13 Am. Law. 7 (Jan. 1905). Since a corporation is held not to be a "citizen," it has been necessary, in order to bring corporations within the "citizenship" jurisdiction of the federal courts, to look behind the corporate entity and take cognizance of the rights of the stockholders as citizens. The law arising from this necessity has gone through three successive stages, according to Judge Baker. The first, represented by Bank of U. S. v. Deveaux (5 Cranch [U. S.] 61), established a rebuttable presumption, at that time in the main true in fact, that a corporation is composed of citizens of the chartering state. But with the increased facilities for travel and intercommunication between the states, and the resultant diversity of citizenship among the stockholders of corporations, came the need of adjusting the rule to these new conditions. Accordingly, the second stage was reached in the case of Louisville, etc., R. R. Co. v. Letson (2 How. [U. S.] 497) which adopted the view that a corporation being an artificial person created by the state is, as such, deemed to be a citizen of that state for the purpose of suing and being sued. This fiction, however, appears almost uniformly in subsequent cases as an irrebuttable presumption that the stockholders of a corporation are citizens of the chartering state, and in that form it receives the writer's support. The distinguishing features of the third stage are the migratory and consolidated corporations holding charters from two or more states. After considerable diversity of decision, the plurality conception of these corporations as having separate existence in each of the chartering states seems for the purposes of determining federal jurisdiction to be now in the ascendancy, although it is not clear whether the fiction of citizenship attaches to any one of the chartering states as a matter of choice or is limited to the state of original charter. *Chicago, etc., Ry. Co. v. Whittton*, 13 Wall. (U. S.) 270; *Southern Ry. Co. v. Allison*, 190 U. S. 326. In either event access to the federal courts is thereby often afforded in a chartering state even for the settlement of controversies with the citizens of that state. This view, in Judge Baker's opinion, is indefensible. With respect to migratory corporations, it disregards the limitation which at the outset justified the fiction, namely, the existence of the corporation's principal offices and business headquarters within the chartering state; with respect to consolidated corporations, it overrides the solidarity conception which has always prevailed in non-jurisdiction cases.

The conclusions submitted by Judge Baker as applicable to corporations holding charters from two or more states are, briefly stated, that the solidarity conception should be true in law as it is in fact; that the habitat of such a corporation should be regarded as co-extensive with its charters; and that the irrebuttable presumption should be that such a corporation, having its headquarters within its habitat, is composed jointly of citizens of the several chartering states.

WIRELESS TELEGRAPHY IN WAR. — Some questions of novelty and importance in international law have been raised by two incidents of the Russo-Japanese war. The first of these was the installation and operation by Russia, during the siege of Port Arthur, of a wireless telegraphic station, situated in Chinese territory, and used to transmit messages from the blockaded city to St. Petersburg. The other was the publication in April, 1904, of a note addressed to the neutral powers, which stated, in substance, that the Russian government proposed to treat as spies all war correspondents making use of wireless telegraphy within the zone of Russian naval operations. These instances of the bearing of wireless telegraphy upon the rights and obligations of neutrals and belligerents are discussed in a recent article by an acknowledged authority. *Wireless Telegraphy in War*, by T. S. Woolsey, 14 Yale L. J. 247 (March, 1905). The author's conclusion in regard to the first incident, that China was

under a duty to prohibit the establishment and operation of the wireless station, seems to be warranted by an analogous precedent. During our own war with Spain, the British government, acting upon the opinion of the legal advisers of the crown, refused us permission to land at Hong Kong a cable from Manila, to be used in the prosecution of the war. It will scarcely be disputed that no distinction can be taken between the cable and the wireless telegraph as a means of communication. Mr. Woolsey forcibly contends, however, that a different rule must apply to cases of the use by a belligerent of a telegraphic system that has been in operation for some time. There a neutral nation should be under no obligation to interfere, because the use for purposes of war is purely incidental to the commercial character of the plant.

From the position taken in the Russian note, the writer dissents. Newspaper correspondents who are found making use of the wireless telegraph to transmit news to their employers cannot, in his opinion, be legally treated as spies, for they lack two essential elements,—a disguise and an intent to inform one of the belligerents. Mr. Woolsey comes finally to the conclusion that the only feasible mode by which belligerents may rightfully control the use of wireless telegraphy by correspondents is by prohibiting it within the zone of military and naval operations, under penalty of confiscation of the instruments used. The opinion is based upon the premise that this is the only method by which a belligerent may preserve its conceded right to censorship. There seems to be no precedent in point. It is, however, but reasonable that a nation at war should be free from the disadvantage of having its plans come prematurely to the enemy's knowledge; and if it is proved, as Mr. Woolsey seems to think it will be, that no method short of absolute prohibition of the use of the wireless telegraph will safeguard this right, the soundness of his conclusion must be conceded.

- ABOLITION OF THE PROFESSIONAL CRIMINAL, THE. *H. J. B. Montgomery*. Advocating prompt assistance of the released convict in obtaining work, as the best way to reduce the number of professional criminals. 30 *Law Mag. & Rev.* 188.
- ACQUISITION DE LA POSSESSION PAR REPRÉSENTANT EN DROIT ROMAIN. *Georges Cornil*. Discussing disputed theories in the Roman law of acquisition of possession through another. 7 *Rev. de Droit Internat.* 80.
- ACQUISITION DU TERRITOIRE ET LE DROIT INTERNATIONAL, L' II. *Ernest Nys*. Examining the methods of acquiring territory not a part of a civilized state. 6 *Rev. de Droit Internat.* 604. III. Treating of protectorates, spheres of influence, and disguised forms of domination in uncivilized regions. 7 *ibid.* 53.
- ADJECTIVE LAW OF THE SMRITIS, THE. (The Hindu Law of Procedure.) *J. R. Gharpure*. 7 *Bombay L. Rep.* 2.
- DE L'AUTORITÉ ET DE L'EXECUTION DES JUGEMENTS ÉTRANGERS EN FRANCE. I. *P. de Paepe*. First of a series of articles on the validity and enforcement of foreign judgments in France. 7 *Rev. de Droit Internat.* 5.
- CITIZENSHIP OF THE UNITED STATES AS A LEGAL STATUS. *Emlin McClain*. Containing an intimation that inhabitants of our new possessions are citizens. 13 *Am. Law.* 57.
- CIVIL DEATH IN VIRGINIA: SUITS AGAINST FELONS. *W. Allen Perkins*. Concluding that there is no civil death in Virginia, and that a felon can be sued under Virginia Code. 10 *Va. L. Reg.* 849.
- COMPARATIVE ROMAN LAW. II. *James Williams*. 30 *Law Mag. & Rev.* 149.
- CONSTITUTIONAL LIMITATIONS ON PRIMARY ELECTION LEGISLATION. *Floyd R. Mechem*. Reviewing the decisions and concluding that legislatures have power to pass all laws requisite for reasonable regulation. 3 *Mich. L. Rev.* 364.
- DISTINCTION ENTRE LA POSSESSION ET LA DÉTENTION, LA. *Georges Cornil*. A comparative study of the distinction in modern civil law between natural and civil possession. 6 *Rev. de Droit Internat.* 646.
- DOCTRINE OF LIS PENDENS AS APPLIED IN INDIA, AND ITS APPLICATION TO SALES IN EXECUTION OF DECREES, THE. *Abdul Karim Khan*. (Continued.) 2 *Allahabad L. J.* 19, 35.
- DOCTRINE OF PREVIOUS JEOPARDY. *Elmer E. Scott*. An article collecting all the authorities. 60 *Cent. L. J.* 191.

- DUE PROCESS OF LAW. *Sanford B. Ladd*. A brief discussion showing the impossibility of exact definition of the phrase and the attitude of the Supreme Court. 9 *Kansas City Bar Monthly* 3.
- ECCLESIASTICAL JURISDICTION IN ENGLAND, THE. *Edwin Maxey*. A short historical sketch of its development. 3 *Mich. L. Rev.* 360.
- ELEMENTS AND MEASURE OF DAMAGES IN AN ACTION BY A DEPOSITOR AGAINST A BANK FOR THE WRONGFUL DISHONOR OF HIS CHECK. *Glenda Burke Slaymaker*. 60 *Cent. L. J.* 144.
- FEDERAL CONTROL OF CORPORATIONS DOING AN INTERSTATE BUSINESS. *E. Hilton Jackson*. Referring to the first annual report of the Commissioner of Corporations, James R. Garfield. 4 *Can. L. Rev.* 166.
- FEDERAL REGULATION OF CORPORATIONS, A DANGEROUS DEPARTURE. *John E. Parsons*. Contending that it would lead to too great a change in our political system. 18 *Green Bag* 135.
- FEDERAL REGULATION OF CORPORATIONS, A PUBLIC NECESSITY. *William J. Curtis*. Maintaining that corporations need relief from continual harassment by state legislatures. 18 *Green Bag* 138.
- FRAUDULENT ALTERATION OF CHEQUES, THE. *N. G. Pilcher*. Maintaining in adverse criticism of a local case that (1) negligence of drawer should protect the bank; (2) existence of negligence should be left to the jury. 2 *Commonwealth L. Rev.* 57.
- FRAUDULENT WAREHOUSE RECEIPTS AND BANKERS' RIGHTS THEREUNDER. *Chas. M. Holt*. Discussing the subject under the Quebec Civil Code. 4 *Can. L. Rev.* 107.
- INDIVIDUALISM AND LEGAL PROCEDURE. *Walter Storrs Clark*. A comment upon the slowness of legal procedure in America, ascribing it to the desire to protect the individual. 14 *Yale L. J.* 263.
- INTER-STATE SERVICE OF PROCESS. *T. R. Bavin*. Upholding the Australian federal statute. 2 *Commonwealth L. Rev.* 61.
- JUDICIAL USURPATION OF POWER. *Camm Patteson*. Advocating limited tenure of office and popular election of judges of the Supreme Court; deprecating the growing use of injunctions; and discussing the case of *South Dakota v. North Carolina*. 10 *Va. L. Reg.* 855.
- LAND TENURE IN THE ISLE OF MAN. *G. A. Ring*. 30 *Law Mag. & Rev.* 129.
- LAW OF ANCIENT LIGHTS AND ITS REFORM, THE. *J. Andrew Strahan*. Pointing out the unreasonableness of the English law on this subject and suggesting reformatory legislation. 30 *Law Mag. & Rev.* 181.
- LEGAL STATUS OF JAPANESE WOMEN. II. *R. Vashon Rogers*. 4 *Can. L. Rev.* 116.
- LEGAL STATUS OF THE PHILIPPINES, THE—AS FIXED BY THE RECENT DECISION OF THE SUPREME COURT IN THE JURY TRIAL CASES. *Lebbeus R. Wilfley*. Suggesting that constitutional provisions relating to fundamental rights should extend to the Philippines, while those relating to such matters as methods of procedure and forms of judicial trial should not. 14 *Yale L. J.* 266.
- LIABILITY OF AN EMPLOYER FOR THE TORTS OF AN INDEPENDENT CONTRACTOR. II. *C. B. Labatt*. A monograph covering 187 pages, treating cases in which liability is imputed to the employer. 41 *Can. L. J.* 49.
- LIFE INSURANCE AND DEATH AT THE HANDS OF THE LAW. *H. N. G.* Maintaining view that recovery should be allowed. 8 *L. Notes* 465.
- LIMITATIONS OF THE ACTION OF ASSUMPSIT AS AFFECTING THE RIGHT OF ACTION OF THE BENEFICIARY, THE. I. *Crawford D. Hening*. Arguing that the English rule that the beneficiary cannot recover in assumpsit is a matter of adjective rather than substantive law. 52 *Am. L. Reg.* 764; 53 *ibid.* 112.
- LIMITATIONS OF THE POWER OF A STATE UNDER A RESERVED RIGHT TO AMEND OR REPEAL CHARTERS OF INCORPORATION. *Horace Stern*. 53 *Am. L. Reg.* 1, 73, 145. See *supra*.
- MARRIED WOMEN'S PROPERTY LAW IN ONTARIO. *Geo. S. Holmsted*. 25 *Can. L. T.* 105.
- NOTICE OF ACCEPTANCE IN CONTRACTS OF GUARANTY. *W. P. Rogers*. Containing a thorough examination of all the cases and contending that the requirement of notice in contracts of guaranty is anomalous. 5 *Columbia L. Rev.* 215.
- PRESUMPTIONS AND BURDEN OF PROOF IN ACTIONS AGAINST CARRIERS FOR INJURY TO PASSENGERS AND DAMAGE TO FREIGHT. *R. O. Summerville*. 60 *Cent. L. J.* 123.
- PSYCHOLOGY OF NEGLIGENCE, THE. *Charles Morse*. Contending that mental attitude should not be regarded in determining the existence of negligence, and that the proper standard is objective. 41 *Can. L. J.* 233.

- PUBLICATION OF LIBEL BY DICTATION TO STENOGRAPHER. *Anon.* Taking an adverse view. 8 L. Notes 467.
- PUBLIC REGULATION OF QUASI-PUBLIC CORPORATIONS. *Henry H. Ingersoll.* Showing that reasonable control of such corporations is legal and proper, and contrasting the Dartmouth College case with *Munn v. Illinois*. 14 Yale L. J. 255.
- REAL PROPERTY LAW IN NEW ZEALAND. *T. F. Martin.* Giving details of statutory provisions to simplify the cumbersome common law of England as to conveying. 2 Commonwealth L. Rev. 49.
- REMOVAL OF PUBLIC OFFICERS FROM OFFICE FOR CAUSE. II. *Alonso H. Tuttle.* 3 Mich. L. Rev. 341.
- RESORT TO THE JUDICIARY TO PRESERVE THE PURITY OF ELECTIONS. *William E. Hutton.* Discussing a recent Colorado case and the extraordinary jurisdiction over elections assumed by the Supreme Court of that state. 18 Green Bag 159.
- RES JUDICATA BETWEEN CO-DEFENDANTS. *K. S. Ramaswami Sastri.* Discussing and classifying the decisions upon the subject. 3 Madras Leg. Comp. 95.
- "RHAPSODY OF ANTIQUATED LAW, A." *Margaret Center Klingelsmith.* An appreciation of Mr. Maitland's recent edition of the Year Books. 52 Am. L. Reg. 755.
- SEVERAL MODES OF INSTITUTING CRIMINAL PROCEEDINGS IN PENNSYLVANIA. *John C. Bell.* 61 Leg. Int. 529.
- SOVEREIGN LITIGANTS. *Albert W. Gaines.* A collection of cases showing that sovereigns may sue in foreign courts but cannot be sued unless they submit to jurisdiction. 13 Am. Law. 54.
- STATE PROTECTION OF SUBJECTS ABROAD. *F. B. Brook.* Discussing the extent to which it should be afforded and the means by which it may be enforced. 30 Law Mag. & Rev. 157.
- THE EXPANSION OF CONSTITUTIONAL POWERS BY INTERPRETATION. *Paul Fuller.* 5 Columbia L. Rev. 193.
- TORT LIABILITY FOR MENTAL DISTURBANCE AND NERVOUS SHOCK. *Francis M. Burdick.* 5 Columbia L. Rev. 179.
- TRANSFER OF INTERESTS IN ASSOCIATIONS, THE. I. TRANSFER OF A PARTNER'S SHARE. *George Wharton Pepper.* A résumé of the laws governing the transfer of interests in partnerships and shares in corporations. 52 Am. L. Reg. 738.
- UNITED STATES DEPARTMENT OF JUSTICE, THE. *John A. Fairlie.* Describing the organization and duties of the Department. 3 Mich. L. Rev. 352.
- WIFE TESTIFYING AGAINST HUSBAND'S PARAMOUR IN ADULTERY CASES. *Edward W. Faith.* Collection of authorities and discussion of principles on which the incompetency of husband and wife to testify against each other is based. 60 Cent. L. J. 164.
- WIRELESS TELEGRAPHY IN WAR. *Theodore Salisbury Woolsey.* 14 Yale L. J. 247. See *supra*.

II. BOOK REVIEWS.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Vol. XIX. For the year 1904. Year Books of Edward II., Vol. II., 2 & 3 Edward II., A.D. 1308-9 and 1309-10. Edited by F. W. Maitland. London: Bernard Quaritch. 1904. pp. xix, 244. 4to.

The appearance of a second volume of Professor Maitland's Year Books of Edward II. is a welcome supplementary volume of the Selden Society's publications for the year 1904. The Society goes beyond its promise in the speed with which the Year Books are issued, and it is to be hoped that this generosity may be continued.

We turn as always to the introduction for wise and witty comment on the matter contained in the text. In this introduction Professor Maitland points out again the gradual way in which the present system of law reporting was evolved. He makes it quite clear that the first reports were scattered notes of cases taken by some apprentice who happened to be interested in a particular case, and that later collections of such notes were made for purposes of study, and that the regular reporting of the transactions in the court came later. One of the manuscripts which are described appears to be an interesting early example of a collection of cases made for the purpose of instruction in law by the inductive method.

The cases were arranged in a logical order under the proper title, and apparently were discussed by the younger apprentices in much the same way that the cases collected for them are now discussed by students in our own schools. After reporting one case, the writer of the manuscript goes on to describe the discussion of the case "in the Crib." Richard de Aldirbury and John Trevanion are named as engaging in the discussion. They were young apprentices at law, not yet engaged in the actual argument of cases at bar, but they were busy counsel several years later, and both of them judges of the Common Pleas about 6 or 7 Edward III.

We already knew that the case system was commended by Coke, but we are glad to learn that it was an accepted method of instruction in the time of Bereford and Spigurnel.

This volume gives added proof of the insufficiency of the manuscript from which Maynard's Year Book was printed; for not only did his manuscript contain only about one-third of the cases found in other manuscripts for this period, but the cases which it did contain were imperfectly reported. From the other manuscripts and from the record Professor Maitland is able to correct Maynard's errors, and to add many interesting decisions. Most of the cases, of course, turn on obsolete questions of land law; but there is a considerable number, particularly among the new cases, of much historical interest, as well as some practical value. For instance, in one of the new cases the plaintiff brought an action of debt for the penalty of a bond; the defendant pleaded that he had tendered performance, and again tendered it in court. The court said: "With what equity can you demand this penalty? Were you to remain asking for our judgment, you would not come by your debt these seven years; for a judgment of the law is not to be given in that sort of way." Professor Maitland points this out as an early example of equitable action. If we could have reports of all the cases during the thirteenth century, we should probably find that the King's court exercised much greater equitable power anciently than it did after the Chancellor began to usurp judicial functions. Glanville states with great precision that King Henry enjoined the judges of his new court to temper the law with equity; and it is very clear that the common law was evolved from the older administrative law of the Normans and the folk-law of the popular courts by tempering their rigor with equity. At the time of Edward II. the original equitable impulse was still felt. In another new case, which was a writ of trespass for disturbance of the market, the judgment, as we learn from the record, included an injunction against future disturbance. Doubtless Professor Maitland is right in suggesting that this was made merely to have the effect of stopping the defendants from raising the same question over again.

May Professor Maitland long be spared to send us an annual volume such as this.

J. H. B.

PRINCIPES DE DROIT INTERNATIONAL PRIVÉ. Par A. Pillet, Professeur à la Faculté de Droit de Paris. Paris: Pedone, 1903. pp. xii, 586.

During the past dozen years Professor Pillet has in his teaching and in numerous articles been working out the theory of Private International Law, or Conflict of Laws, which he now presents in book form. It is an especially important work in that it gives the matured thought of a Continental scholar, trained in the civil law and familiar with the writings of American and English jurists, on a subject of great importance, as to the basic principles of which there is much disagreement.

The book is one of theory, written by a man who believes that students who are not first good theorists will be poor practitioners. There has been no attempt to make it a manual for the practising lawyer by the collection of all the cases on every-day subjects; only those have been retained which were of use in developing the principles. Nor is it a book for the beginner. But all, whether theorists or practical men, who are anxious to learn the foundations of

the law, will find in it much of value, even though they may differ from the conclusions reached.

As was to be expected from his nationality and training, the author in many matters runs counter to accepted common-law theories as to the conflict of laws. He regards Private International Law as a true system of law, and rejects utterly the idea, current in this country and in England, that its basis is the comity or courtesy of nations, which leads the sovereign to tolerate the application on his soil of foreign law to the degree rendered desirable by international intercourse. For him it is truly a branch of international law.

The most important and most novel part of the book is the author's own theory of the method by which conflicts of laws should be solved. He believes that every man should be governed by one law, which on principle should be determined by nationality, though the exigencies of practical life often require that it shall be the law of the domicile. This law should be continuous, that is to say, it should govern one in all the relations of life everywhere. But there is another requisite of law, that it should be general, the same for all the people in a given country. If a foreigner comes in whose personal law differs, it is obviously impossible to have both continuity and generality preserved. Which shall give way? M. Pillet examines the object of the law in question. If he finds that the law is for the protection of the private person, he would give it extra-territorial operation and preserve its continuity. If, however, the object of the law is the good of society as a whole, the interests of the individual must yield and continuity be sacrificed. The application of this novel theory requires careful consideration of the real object of a law, and to this subject an important part of the work is devoted.

Professor Pillet disclaims any idea of having solved all the problems of Private International Law, specifically admitting his inability to settle certain ones on any theory. But there is no question that he has produced a very valuable and stimulating book.

CONSTITUTIONAL LAW IN THE UNITED STATES. By Emlin McClain. London and Bombay: Longmans, Green & Co. 1905. pp. xxxviii, 438. 8vo.

This book by Judge McClain is one of the American Citizen Series published by Longmans, Green & Co. under the editorship of Professor Albert Bushnell Hart. The book is in no sense a law book, nor does the author intend that it should be so considered. In his preface Judge McClain states that it is "intended to give to non-professional students an intelligent conception of the Constitutional Law of the United States, both state and federal." For such students the book is undoubtedly of value. Judge McClain's scholarship and ability are sufficient guarantee of the carefulness and thoroughness of the work; and his experience both on the bench and as a lecturer on Constitutional Law at the State University of Iowa, puts him in a position to know the importance of the various branches of constitutional law, and the best way in which to give the student a clear understanding of it.

He has approached the subject from the viewpoint of the historian. References are made to English and Colonial institutions, so far as is necessary to explain the nature of our governments, both state and national. But though he has traced the sources from which our government is drawn, and the way in which it was created, Judge McClain has not written a mere history of it, nor a mere exposition of its actual working at the present day. He has borne in mind that our constitutional law is concerned mostly with the interpretation of written instruments, in themselves more or less unchanging, and he has shown the theories underlying the interpretation of those instruments, as well as the value and the effect of the precedents that exist as a result of actions and decisions of courts.

Covering the subject in so few pages, Judge McClain was, of course, obliged to condense a great deal. The book, consequently, is not one from which the untrained reader would gain much. But for the student who has been trained

in the history of England and of the United States, it will be of great value to supplement and complete his studies, because of its conciseness, and because it is written by a trained jurist who knows whereof he speaks, both theoretically and practically.

A select bibliography is prefixed to the main body of the work, giving the standard works on the general subject matter of constitutional law and history. The bibliography is divided under the headings of Constitutional History, Formation and Adoption of Federal and State Constitutions, Theory of Our Government, Description of the Actual Government in the United States, Technical Works on Constitutional Law, and Judicial Decisions. At the beginning of each chapter are references, not cited as authorities for the statements in those chapters, but intended to serve as suggestions for collateral reading. In the course of the book, most of the leading decisions of the Supreme Court on the more important points of constitutional law are referred to.

An appendix of documents contains extracts from Magna Charta, the English Bill of Rights, the Virginia Bill of Rights, the Declaration of Independence, the Articles of Confederation, the North West Ordinance and the Constitution of the United States.

THE ORGANIZATION AND MANAGEMENT OF BUSINESS CORPORATIONS. By Walter C. Clephane. St. Paul, Minn.: West Publishing Co. 1905. pp. xxvi, 246. 8vo.

This book is a result of a frequently urged demand for law school instruction in the practical application of legal principles. It is, therefore, intended primarily for students. The author designs also to assist lawyers who have not had the advantage of practical corporation office work and laymen who are officers of corporations. He makes no effort to deal to any extent with the principles of corporation law, but confines himself to directions and suggestions as to the actual forming and carrying on of corporate bodies.

With these aims and purposes in view, he discusses first at considerable length the general corporation laws of a number of the states that he regards as the most favorable for the formation of business corporations, emphasizing the importance of choosing for the domicile of a particular corporation a state in which the incorporators may accomplish their purposes with the maximum benefit and the minimum liability and expense. He then takes up in successive chapters the formation of the corporation and the proceedings at the meetings respectively of incorporators, directors, and stockholders. The book ends with one chapter on the amendment of charters and another devoted to the important topic of reorganization. Somewhat more than one-fourth of its pages are given up to the forms to be used at the various stages in the organization and management of the corporation. In view of the fact that the book is intended for use in various jurisdictions, it would have been obviously impracticable to attempt to gather together all of the forms that could conceivably be desired. At the same time Professor Clephane has collected a number that might be found useful in any state, and for these, as well as for the careful directions by which they are accompanied, it is believed that the book should be of considerable value to the young practitioner and of much interest to the student.

SELECT STATUTES, CASES, AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660-1832, with a supplement from 1832-1894. Edited by C. Grant Robertson. New York: G. P. Putnam's Sons. London: Methuen & Co. 1904. pp. xviii, 452. 8vo.

This volume contains the great English statutes and cases since 1660 in which those rights of the subject to freedom of thought, of speech, and of action which are to-day unquestioned, were established and confirmed. Such a collection is of interest to the lawyer as a student of constitutions and govern-

ments rather than as a practitioner. Particular attention may be called to the statute 4 Geo. II. c. 26 (1731), found on page 123, which recites that "many and great mischiefs do frequently happen to the subjects of this kingdom from the proceedings in the courts of justice being in an unknown language," and provides that from and after March 25, 1733, all pleadings and court proceedings shall be "in the English tongue and language only, and not in Latin or French," under penalty of a fine of fifty pounds imposed upon the person offending against the act. Fox's Libel Act, providing that in indictments for libel the jury may give a general verdict upon the whole matter put in issue, is another interesting statute found in the collection. The cases in the book, like the statutes, mark the development of individual liberty. Cases representative of the object and scope of the collection are *The Queen v. Nelson and Brand*, on page 390, in which Cockburn, C. J., questions the existence of a so-called "martial law" applicable to a citizen who is not a member of a military company, and *Bushell's Case*, on page 223, establishing the immunity of the jury from punishment by the court for a verdict alleged to have been against the evidence or the law laid down by the judge. The book should readily make a place for itself in the library of the student of history or of government.

STREET RAILWAY REPORTS, reporting the electric railway and street railway decisions of the Federal and State courts in the United States. Edited by Frank B. Gilbert. Vol. II. Albany, N. Y.: Matthew Bender. 1904. pp. xix, 1051. 8vo.

In this volume of the *Street Railway Reports* Mr. Gilbert follows the method of treatment which was so successfully initiated in the first volume of the series. As might be expected, the later book is more carefully edited and more pretentious than its predecessor; but in arrangement and structure the two are identical. The most marked improvement is in the scope of the notes, which, though not exhaustive, present an admirable review of the authorities upon the special subjects covered, and form by far the most valuable part of the work. Upon the topics of imputed negligence, eminent domain, municipal control, and fellow-servants, the discussion is especially full, the decisions being collected with care and so grouped as to be easily accessible for reference. The incorporation of all the cases decided in the state courts of last resort and in the federal courts concerning street railways undoubtedly introduces some material of comparative unimportance, and increases the bulkiness of each volume; but the convenience of having at hand a complete and well-indexed collection of the decisions on the subject, rendering unnecessary a laborious perusal of the larger digests, will for the specialist on this branch of the law outweigh such incidental disadvantages.

THE DICTIONARY OF LEGAL QUOTATIONS; or, Selected Dicta of English Chancellors and Judges from the Earliest Periods to the Present Time. Extracted mainly from reported decisions, and embracing many epigrams and quaint sayings. With explanatory notes and references. By James William Norton-Kyshe. London: Sweet and Maxwell, Limited. 1904. pp. xxi, 344. 8vo.

The roll of English judges contains a long line of learned men, and in the exposition of their opinions they have dropped much that is wit, much that is sound common sense, and much that is of worth as precedent. The compiler of this book has collected with considerable labor the best of these legal crumbs, and by means of extensive cross-references and a complete index, put them in shape for ready use. But notwithstanding the fact that the learning contained in the collection is valuable and interesting, its value and interest are for the scholar rather than for the active practitioner.

- ABRIDGEMENT OF ELEMENTARY LAW, embodying the general principles, rules and definitions of law together with the common maxims and rules of equity jurisprudence, embracing the subjects contained in a regular law course, collected and arranged so as to be easily acquired by students, comprehended by justices, and readily reviewed by young practitioners. By M. E. Dunlap. Revised by T. F. Chaplin. Third Edition. St. Louis: The F. H. Thomas Law Book Co., 1905. pp. v, 600. 8vo.
- A PRACTICAL TREATISE ON THE LAW OF RECEIVERS as applicable to Individuals, Partnerships, and Corporations, with Extended Consideration of Receivers of Railways and in Proceedings in Bankruptcy. By William A. Alderson. New York: Baker, Voorhis & Company. 1905. pp. lxxi, 956. 8vo.
- GAII INSTITUTIONES, or Institutes of Roman Law by Gaius. With a translation and commentary by the late Edward Poste. Fourth Edition, revised and enlarged by E. A. Whittuck. With an historical introduction by A. H. J. Greenidge. Oxford: The Clarendon Press. 1904. pp. lv, 668. 8vo.
- JURISDICTION AND PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES. By Hannis Taylor. Rochester: Lawyers' Co-operative Publishing Co. 1905. pp. lxvi, 1007. 8vo.
- THE NATIONAL ADMINISTRATION OF THE UNITED STATES OF AMERICA. By John H. Fairlie. New York: The Macmillan Company. 1905. pp. vii, 274. 8vo.
- THE AMERICAN CONSTITUTIONAL SYSTEM. By Westel W. Willoughby. New York: The Century Co. 1904. pp. 318. 8vo.

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MCCULLOCH *v.* MARYLAND IN AUSTRALIA.

AMERICAN lawyers and publicists will be interested to learn that the doctrine of *McCulloch v. Maryland* has been accepted and applied in Australia. The Australian federal Constitution¹ must be taken to forbid the collection of a state income-tax from federal servants in respect of their official incomes. There is nothing express in the Constitution on the subject; but the recently constituted High Court of Australia has discovered the implied prohibition in the Victorian income-tax cases.² *Jus est — id quod judices dicunt.*

The decision has attracted much attention throughout Australia. The man in the street is startled and puzzled. He sees a public official, enjoying a regular salary in the postal department, paying the Victorian income-tax until federation, and then suddenly exempted from the tax because the post-office has passed over to federal control. The official receives just the same benefits from the state activities as he received before; — and state activities are many in Australia. He has the same protection from the police, the same educational privileges for his family, the same conveniences from railways and other public works. His neighbor of the Lands Department and his neighbor the grocer get no more benefit from the state's expenditure than he; and yet they continue to pay the income-tax, and he ceases to pay it. Why?

It must be admitted that the surprise, and even indignation, manifested in many quarters are excusable. The public have not

¹ 63 & 64 Vict. c. 12.

² 1 Com. L. Rep. 585.

yet become familiar with the federal system, with the peculiar problems which are presented when two governmental machines, each supreme within its own sphere of operations, are in full play over the same territory and the same people. But is it too much to expect that the writers in newspapers, and others who aspire to guide public opinion, should read and weigh the closely reasoned judgment of the High Court before criticising it, and should know something of the great and continuous stream of masterly decisions of the United States Supreme Court which the judges of the High Court have followed? Probably there has not been in the history of jurisprudence any development more curious or instructive than that of the written Constitution of the United States — the gradual unfolding of the potential implications of its short, pithy sentences — the transition from deduction to deduction, from inference to inference — the laborious and cautious adaptation of a rigid, almost unalterable instrument of government to the live needs of a rapidly growing people and an increasingly complex civilization. If the High Court has erred, it has erred under the fascination of jurists and statesmen of the type of Marshall; and it has merely placed the public officials of Australia in the same position, as to exemption from income-tax, as the public officials of the United States, and even of Canada.

The judgment itself is, in the main, merely a reaffirmance and application of the principles previously laid down by the High Court in *d'Emden v. Pedder*.¹ In that case the deputy post-master-general of Tasmania was prosecuted for giving an unstamped receipt for his month's salary to the federal paying officer. A Tasmanian act makes "every receipt" for £5 to £50 liable to 2*d.* stamp duty; and any person giving a receipt unstamped is liable to a penalty. On the other hand, the federal Audit Act (No. 4 of 1901) requires every public accountant at the time of paying any account to obtain a receipt. It might, perhaps, have been sufficient to say that the federal parliament had "exclusive" power to make laws with regard to the postal department, under sec. 52 of the Constitution; and that the requirement of the state law was a direct interference with the officers of a federal department in the execution of their duty. Such was the aspect in which the Supreme Court of Victoria regarded *d'Emden v. Pedder*, when it was cited in the income-tax case.² But in *d'Emden v. Pedder* the

¹ 1 Com. L. Rep. 91.

² 29 Vict. L. Rep. 748.

judges of the High Court based their decision on much broader principles, taking a comprehensive survey of the relations of federal agents and agencies to state legislation. They had laid down the following proposition as the true test to be applied in determining the validity of state laws and their applicability to federal transactions:

“When a state attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative.”

It may be observed, in passing, that this proposition, as expressed, would seem to prevent a state policeman from arresting for a crime a federal officer on his way to his work. But whether it covers too wide a ground or not, the judges of the High Court evidently intend to treat it as the guiding principle, the major premise in all judicial syllogisms, on the subject of federal agencies. Where have they found this principle? They have found it in the nature of the Constitution. The express grant of power and control to the Commonwealth would, they say, be ineffective unless the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself.¹ *Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest*; and therefore the grant of constitutional powers to the Commonwealth involves the grant of absolute freedom from control.

In arriving at this principle the High Court was guided by the weighty judgment of Marshall, C. J., in *McCulloch v. Maryland*,² pronounced in 1819, and followed in innumerable cases in the United States. On this decision the whole fabric of the doctrine as to federal agencies has been reared in the United States and in Canada, and now in Australia. The case is so familiar in the United States that it may seem unnecessary in an American review to restate the facts and the outlines of the decision. But it seems to be more satisfactory to do so when a foreigner is endeavoring to show the impression which it has made on his mind. If he is wrong, his error can be the more readily detected. In 1816

¹ See 1 Com. L. Rep. 109-111.

² 4 Wheat. (U. S.) 316.

Congress passed an act purporting to incorporate the Bank of the United States; in 1817 a branch was established at Baltimore, Maryland; and in 1818 the state legislature of Maryland passed a law taxing all banks or branches thereof *not chartered by the state legislature*. The cashier of the branch, one McCulloch, was sued for the amount of the tax, and, the state court having given judgment for the plaintiff, an appeal was brought to the Supreme Court of the United States. The first question was, had Congress power to incorporate a bank? Now the Constitution conferred on Congress power to legislate on certain enumerated subjects; and unless the power were given expressly or by necessary implication, Congress could not have it—its legislation would be void. The states retained all the residuary powers: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."¹ The Constitution does not prohibit the states from creating corporations for purposes of gain or otherwise. Indeed, each of the states has its own company law. But in conferring on Congress the specific powers of legislation, the following general power was added: "To make all laws which shall be *necessary and proper* for carrying into effect the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." This general power is not treated by the jurists as enlarging the powers specifically given, or as granting any new power to Congress. It merely removes all uncertainty that the means for carrying into execution the express powers are included in the grant.² Marshall also relied on the fundamental fact that *within its sphere of action* the federal power is supreme: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."³

The Constitution then, being one of enumerated, not residuary powers, and there being no express power to create corporations—whether for private gain or for any other purpose—where did Marshall find the power in Congress to create this bank? The bank was owned by a company of persons, shareholders, carrying

¹ Art. X.

² Cooley, Const. L. 105; Hare, Const. L. 117.

³ Art. VI.

on the business of banking for their private profit. The United States took one-fifth of the capital, \$55,000,000. The federal government was to deposit its funds with the bank, the bank receiving the revenues collected, and disbursing on federal cheques; and in return for the privilege of holding the floating government balances, the bank had to pay the government \$1,500,000 *per annum*. The government offices took the bank notes at par in payment of duties; and the bank was bound to redeem its notes in coin. Such was the bank. It saved the federal government the expenses of custody, of transportation; it kept huge sums of government money in circulation by way of loan, for the convenience of the people. But it is not to be overlooked that there were local banks and state banks in existence, willing to undertake all the work that the government required to be done.¹ Where, then, did Marshall find the power? He derived it from the "power to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies." For revenue has to be collected and expended through a vast territory; armies are to be supported on march; moneys raised in the North may have to be transported to the South, etc. The government which has a right and a duty to do an act must be allowed to select the means. The power to create a corporation (he says) is never used for its own sake; and it may fairly be taken as incidental to powers expressly given. Besides, there was the general power to make all "necessary and proper" laws for carrying into effect the express powers; and "necessary" does not mean absolutely necessary, but calculated to produce the end in view. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit, are constitutional." I think this is a fair summary of the reasoning, extracted from a mass of noble rhetoric.

Then the question arose, could the state of Maryland tax the bank without violating the Constitution? The Maryland act required the notes of the bank to be on stamped paper furnished by the state; and the amount of the stamp was regulated by the amount of money specified on the note. This, Marshall held, was a tax on the operations of the bank, and so "a tax on the operation of an instrument employed by the government of the Union

¹ 2 Story, Constitution, 3d ed., 147.

to carry its powers into execution," and therefore void. For the laws made under the Constitution were supreme. There was, in the Constitution, one whole section devoted to restrictions on the powers of the states.¹ The states, hitherto independent and sovereign, were forbidden to make treaties, to coin money, to emit bills of credit, to make anything but gold and silver legal tender, to pass laws impairing contracts, to grant titles. There were, in the same section, express prohibitions even as to state taxation; for the states were forbidden (without the consent of Congress) to levy import or export duties, or duty of tonnage. Marshall admitted that the previously existing right of the state to tax was not abridged by the grant of a similar power to the Union. The powers not prohibited by the Constitution to the states were reserved to them;² and the express prohibitions might well be taken by some minds as negating any implied prohibition — *expressio unius exclusio alterius*. But this was not Marshall's view. For the states, if they had power to tax at all, might tax the bank out of existence. If it were urged that the state legislatures, responsible to the electors, had to be trusted, the answer was that this argument, however applicable to state agencies and state electors, did not apply to federal agencies created by the people of all the states. If it were urged — as, indeed, it was put by Mr. Justice a'Beckett in Wollaston's case,³ in which the point as to income-tax first came before the Supreme Court of Victoria — that it would be time enough for the court to interfere when any real obstruction to federal power or diminished efficiency in the federal agency has been proved, the answer of Marshall was clear and sufficient — that the courts must not be "driven to the perplexing enquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to an abuse of the power." If the state can tax at all, there is no point at which the tax can be said to become void. "They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house," etc. Marshall discovered the dividing line at the point where sovereignty and the sovereign power of taxation end. "The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission"; and federal instrumentalities do not come within this class.

¹ Art. I. § 10.

² Art. X.

³ 28 Vict. L. Rep. 395.

It seems clear that Marshall was influenced by the fact, which was obvious, that at a time when political feeling ran high in favor of and against the new national bank, the Maryland act was directly aimed at the bank, to injure it. But he did not base his judgment on such unsafe ground for a court as the possible motive of a legislature. He rested on the broad principle that the sovereign power of state taxation ends where the sovereign power of the federal legislation begins. Therefore it was as a mere corollary that the decision came in 1842 that a state could not levy income-tax upon a federal officer.¹ One Dobbins was captain of a revenue cutter in the federal service, and resided in Erie County, Pennsylvania. In pursuance of an act of Pennsylvania, he was assessed for his office, as such, for county rates. Under the act the assessors had to rate offices, posts of profit, professions, etc., having a due regard to the profits arising therefrom. This act was not aimed at federal officers: it applied to all. It was admitted by counsel for the state that the vessel, its appliances, its guns, could not be taxed—say by a tax on personal property. Then why tax the officer, who is equally a means for executing the national powers? Such taxation would compel Congress to graduate salaries according to the taxes in each state. It would destroy all uniformity of compensation. It would give the states a revenue out of the revenue of the United States. It would be an interference with the means devised by Congress to carry into effect its powers. It would, finally, conflict with the law of the United States, which secures the salary to the officer in its entirety.

The principle laid down in *McCulloch v. Maryland* has long been accepted as indisputable law throughout the United States. As Mr. Justice Story said in his Commentaries,² "If it is not now settled, it never can be." It has been applied *e converso* so as to exempt state officers from federal taxation of incomes.³ It has been applied to United States government stock, but not to a federal officer's own house or possessions. It has been recognized by Congress in its legislation; for Congress, in creating national banks in 1864, provided specially that shares in such a bank might be included in the valuation of personal property for the purpose of state taxation, if the burden were not made greater than on

¹ *Dobbins v. Erie County*, 16 Pet. (U. S.) 370.

² 1858, 3d ed., p. 161.

³ *Collector v. Day*, 11 Wall. (U. S.) 113, 124.

other similar property.¹ The Attorney General for Tasmania, in his argument for his state in *d'Emden v. Pedder*, did not suggest that the case of *McCulloch v. Maryland* was wrongly decided as matter of law in the United States;² nor did counsel for the commissioner of taxes in Victoria.³ They attempted to distinguish the Constitution of Australia from the Constitution of the United States — they did not attempt to dispute Marshall's reasoning. The High Court was not asked to reconsider this.

Yet — was Marshall right, as a lawyer, in *McCulloch v. Maryland*?

Of course, it has been said that his decision saved the young federation, that it made the constitution workable. But the question is, was he interpreting the law or making it? *Judicis est jus dicere, non dare*. If it be urged that the laying down of this principle is a grand piece of constructive statesmanship, I have nothing to say. But then let us clearly understand that, according to such light of statesmanship as they may happen to possess, the judges are to supply gaps in legislation, to amend constitutions. Marshall, however, would have been the last to admit that a different principle was to be applied in the interpretation of a constitution and in the interpretation of other documents; or that, in his doctrine of implied powers and implied prohibitions, he passed beyond the legitimate bounds of fair construction. "The doctrine of implied powers," says Hare, "contains nothing exceptional or peculiar, or that is not applied in the interpretation of other instruments."⁴ From the point of view of the lawyer, it is all a question of agency — what was the federal Congress authorized to do? What was the state forbidden to do? Certain definite and specified powers were conferred on Congress; and, amongst others, "power to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies." The residue of the powers was left — as before — with the states, which admittedly could create corporations for purposes of private profit. Yet Marshall deduced from the specified powers which I have mentioned an implied power to create a corporation for purposes of banking, for the private profit of the shareholders, but which could be made use of by the federal power. If this deduction is right, — that Congress can incorporate companies for private profit, — it is hard to see why it

¹ 13 U. S. Stats. at L. c. 106, s. 41.

² 1 Com. L. Rep. 103, 111.

⁴ Const. Law 117.

³ 1 Com. L. Rep. 585.

cannot enact federal marriage laws, in the interests of the order and efficiency of the federal service. Again, as I have already stated, the restrictions on the action and legislation of the states were collected in the Constitution in one section. These included restrictions on the taxing power of the states. Yet Marshall discovered another implied restriction under which states were prohibited from taxing federal agencies. His reason was that if the states had power to tax such agencies they *might* exercise it to such an extent as to cripple, if not wholly defeat, the operations of the national authority.¹ I ask, is this a sufficient ground for saying that the power is by the Constitution absolutely prohibited? Mr. Justice Story thought not. At least, in the case of *Martin v. Hunter's Lessee*,² decided in 1816, before *McCulloch v. Maryland*, he said: "It is always a doubtful course, to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power a restriction which is not to be found in the terms in which it is given."

I venture to think that the introduction of powers by implication, of prohibitions by implication, cannot legitimately be carried so far, — at least, under modern British law. Judges, in interpreting and applying the law, have no right to assume the function of legislators. The justification for judges introducing words which have not been expressed must rest on logical necessity, not on political expediency. The implication must be necessary, not conjectural or argumentative. In the analogous case of easements of necessity, the grant is not implied if the grantee has any other means of access to his land, however inconvenient, than by passing over the grantor's soil. Since 1819 the limits of implication have been more clearly defined than before. For instance, there was the case of *Doyle v. Falconer*,³ before the judicial committee of the Privy Council in 1866. A member of the Assembly of Dominica was taken into custody and committed to gaol for a contempt committed in the face of the Assembly. He brought an action for trespass and for false imprisonment. The Assembly had been duly constituted, by royal prerogative, but had been given no express power to commit. It was held that the defendants were liable for the false imprisonment, but not for putting the plaintiff out of the House. "The right to remove for

¹ See Cooley, *Const. Lim.*, 7th ed., 680.

² 1 Wheat. (U. S.) 344, 345.

³ L. R. 1 P. C. 328.

self-security is one thing; the right to inflict punishment is another." The former power is necessary to the existence of such a body; the latter is not—although very desirable. "Their Lordships, sitting as a Court of Justice, have to consider not what privileges the House of Assembly of Dominica ought to have, but what by law it has." Some seem to forget the force of "*esse*" in the maxim *Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa esse non potest*. This is the word—*esse*—found in Coke¹ and in Broom's Legal Maxims.² The test is, is the power necessary to the *existence* of such a body? This case was followed in *Barton v. Taylor*;³ where, on similar grounds, the Speaker of the New South Wales Assembly—who happens to be a party to the income-tax decision as one of the Justices of the High Court—was held to have no implied authority to exclude an obstructing member beyond the duration of the sitting. The judicial committee refused to follow United States cases, such as *Anderson v. Dunn*,⁴ where it was held that the House of Representatives had, by necessary implication, a general power to commit outsiders for contempt, although the Constitution expressly conferred only a power to punish for contempts committed by its own members. Probably, if the United States Constitution were not so difficult—I might say, impossible—to amend, the Supreme Court of the United States would not have allowed themselves to carry its implications so far. Here, as in so many other constitutional difficulties of the United States, we are brought face to face with its radical blemish—its rigidity.

"But," it may be asked, "was the national power to be treated as helpless in the face of such a direct attack as that made by Maryland?" Even if the answer were "Yes—unless the Constitution were amended," what then? The judges would have been doing their duty, leaving it to the people—under the constitution—to do theirs. But was the national power helpless? Could not Congress, which had power to create national agencies, protect them by express legislation? Congress could isolate national property: could it not isolate national servants? Could it not pass an act defining the relations of its servants to the state laws of taxation, forbidding taxation absolutely, or forbidding some particular tax, or forbidding it except under certain conditions? Congress has passed legislation taking away the exemption within

¹ 11 Rep. 52.

² 11 App. Cas. 197.

³ 4th ed. 471.

⁴ 6 Wheat. (U. S.) 204.

certain limits (in the Act of 1864 as to national banks). If that legislation is valid, why not an act creating such an exemption as seems to be necessary? I cannot find that any such suggestion was made in the argument before Marshall. Marshall entrenched himself on very strong ground when he spoke of the power of taxing being unlimited, and of the unfitness of the judicial department for the inquiry, "What degree of taxation is the legitimate use, and what degree may amount to the abuse of the power?" But though an unfit subject for the judiciary, it is not an unfit subject for Congress. "A power to create implies a power to preserve." These are Marshall's own words; and if Congress has to see to the execution of the national powers, if its legislation is to be supreme where it conflicts with state legislation, it may fairly be urged that an act protecting its servants from certain state taxation would be valid. The position is analogous to that under the trade and commerce clause. Any measure of state legislation, however legitimate in itself, yields to positive regulation of interstate or foreign commerce by act of Congress, if inconsistent with it.

At first blush, there is a great deal of force in the view put by the High Court in *d'Emden v. Pedder*, and in the income-tax cases,—that the interpretation of the United States Constitution having been long settled by judicial decision, it is a reasonable inference that it was intended by the framers of the Australian Constitution, when adopting similar language, that like provisions should receive like interpretation. But, on the one hand, it is doubtful whether this consideration should have so much weight where the words adopted have been taken from a foreign constitution, of which the framers of the Australian Constitution had no experience in the details of its working, and where the people who accepted and the Imperial Parliament which enacted the measure had practically no option but to accept it or reject it as a whole. And, on the other hand, the words are not the same in the two constitutions. However closely, in certain respects, the general framework of the Australian Constitution follows that of the United States, the sections 106–109 of the Australian Constitution are not the same in language as the Tenth Amendment of the United States Constitution; and the inference that the same form of words carries the same construction or the same consequences does not fairly arise.¹

¹ The Australian sections are as follows:—

106. The Constitution of each State of the Commonwealth shall subject to this

It may be said that the correctness of the decision has now become a question of merely academic interest, the judgment of the High Court being final. The High Court has, with dignity and emphasis, refused to certify in favor of an appeal from itself to the Privy Council. The High Court has been given, by the Constitution, a peculiar status as guardian of the Constitution; and no "special reason" was put before the court which would justify it in shunting its great responsibility. The assertion of the position of the court in relation to the Constitution is far more important than the question of the propriety of the particular decision. So far as one can foresee, the decision will probably be treated as binding and conclusive, for many years to come. Then what is to be done? I agree with those who think that federal servants should pay the same taxes as their neighbors to the state in which they live. The argument that by compelling them to do so you destroy the uniformity of conditions for similar work in different states, which is the aim of the public service system, may be greatly exaggerated. A postmaster in Queensland, in the same class as a postmaster in South Australia, may get the same salary; and yet the climate may be different, the building may be better in one place than another. One may have his friends near him, the other may not. In Western Australia there is no income-tax; in Victoria there is; and yet the comparative cheapness of food and clothing and the other advantages in Victoria may be some compensation for the tax. What is to be done? In the United States a law was passed which purported to enable the states to tax the stock of national banks on the same scale as other personal property; and I have not found

Constitution continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State as the case may be.

108. Every law in force in a Colony which has become or becomes a State and relating to any matter within the powers of the Parliament of the Commonwealth shall subject to this Constitution continue in force in the State, and until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former shall to the extent of the inconsistency be invalid.

that the validity of the law has ever been contested. Yet it is hard to answer the argument of Senator Howard, in the debates which led up to that act, — that as, according to *McCulloch v. Maryland*, the Constitution forbade the taxation of such stock, Congress could not take away the prohibition. "It is certainly a very singular notion about states rights that the Congress of the United States can give to states rights of legislation which they did not previously possess."¹ Perhaps the best course — if we try to escape the effects of the decision — is for the federal Parliament to authorize a deduction from the salary of each federal officer of the amount which he would have had to pay as income-tax to his state and to pay the amount of the deductions to the state in which the officer lives. But even this suggestion is not without grave difficulties, practical as well as constitutional.

H. B. Higgins.

MELBOURNE, VICTORIA.

¹ See *Congressional Globe*, 1864, p. 1958.

THE POWER OF CONGRESS TO REGULATE RAILWAY RATES.

THE power of Congress to regulate railway rates is based upon that section of the Constitution which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."¹ This grant of power, however, is limited by the provision that "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another."² It is also limited by the Fifth Amendment, which provides that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." Furthermore, it is subject to certain well-settled constitutional principles underlying our form of government, namely: (1) Congress cannot delegate its legislative powers; (2) Congress cannot confer judicial powers, except upon courts established in the manner provided in the Constitution; and (3) Congress cannot confer non-judicial powers upon a duly established court.

In framing any congressional legislation vesting in a commission power to fix or control the charges of railway companies in respect of interstate commerce, it is essential to take into consideration the following propositions:

1. Unreasonably high rates are illegal. A public carrier is prohibited by the common law from making any unreasonably high charge, and this common law prohibition has been reinforced by the Interstate Commerce Act as to all interstate rates of railway companies.³ Congress has also strictly prohibited interstate carriers from making any unjust discrimination of any kind. These statutory prohibitions undoubtedly are constitutional and valid.

2. The states have power to regulate domestic rates. It is settled by the decisions of the Supreme Court of the United

¹ Art. I. § 8.

² Art. I. § 9.

³ Maximum Rate Case, 167 U. S. 479, 501.

States that the legislature of a state can regulate the charges of railway companies for the transportation of passengers and freight wholly within the state.¹ However, inasmuch as the power to regulate interstate commerce is vested by the United States Constitution in Congress, a state cannot regulate the charges in respect of interstate commerce.²

The power of a state to regulate the charges of railway companies in respect of transportation wholly within the state is subject to the Fourteenth Amendment of the United States Constitution. Accordingly, a state statute, or a regulation made under authority of a state statute, limiting or fixing the rates of a railway company within the state in such manner as to deprive the company of reasonable compensation, would be in violation of the Constitution.³

3. Congress has power to regulate interstate rates. The power of Congress to regulate the charges of railway companies in respect of interstate transportation is not necessarily coextensive with the power of the states to regulate charges in respect of domestic transportation. The power of Congress is based wholly upon the affirmative grant by the Constitution of power to regulate interstate commerce. The several states not only have the power to regulate domestic commerce, but they possess all other legislative powers that are not taken away by the Constitution of the United States. Congress cannot base its power to regulate charges of railway companies in respect of interstate transportation solely upon the principle established by the decision in *Munn v. Illinois*. An act of Congress regulating rates of a railway company cannot be sustained unless it is a regulation of interstate commerce within the meaning of the Constitution; nor can it be sustained if it gives a preference to the ports of one state over those of another, or if it deprives the railway company of liberty, or property, without due process of law.

While, no doubt, Congress can prohibit railway companies from charging more than reasonable compensation for the services rendered by them in interstate transportation, it has not unlimited power to interfere with them in their interstate transportation, or

¹ *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., Ry. Co. v. Iowa*, 94 U. S. 155, and subsequent cases.

² *Hanley v. Kansas City S. Ry. Co.*, 187 U. S. 617.

³ *Smyth v. Ames*, 169 U. S. 466.

to exercise unlimited control over interstate railway companies in the use of their property, or in the transaction of their business. It is well settled that the Fifth Amendment and the Fourteenth Amendment not only prevent Congress and the several states from actually confiscating property or destroying its value, but also protect the liberty of contract and the liberty of the owner of property in its use and enjoyment.¹

4. Neither Congress, nor a commission created by Congress, can fix the rates of a railway company solely on the basis of the value or of the cost of its property — rates can be fixed only on the basis of allowing the carrier to charge in each case reasonable compensation for the services rendered.

The property of a railway company is, practically, of no value except for railway purposes, and its *value* depends wholly upon its earning capacity when used for such purposes. This earning capacity, in turn, depends wholly upon the rates which the company can charge, the volume of its business, and the expenses of doing that business. It would, therefore, be illogical to attempt to fix the rates of a railway company on the basis of the *value* of its property. The value of the property is fixed by the rates and not the reverse. In *Smyth v. Ames*² the Supreme Court said that "the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public"; but it is obvious from the context that the word "value" was not here used in its usual sense.

At common law the reasonableness or unreasonableness of a rate charged by a railway company does not depend upon the original *cost* of the property used by it, nor upon the *cost* of reproducing a similar property. There is no rule of law limiting the income of a carrier according to the cost of its property. The question in each instance is whether the rate charged by the carrier requires the payment of more than reasonable compensation for the service rendered.³ A carrier cannot charge more than reasonable compensation for the service rendered, merely

¹ *Lake Shore, etc., Ry. Co. v. Smith*, 173 U. S. 684, 691, 697; *Allgeyer v. Louisiana*, 165 U. S. 578; *Lochner v. New York*, U. S. Supreme Court, October Term, 1904.

² 169 U. S. p. 546.

³ *Cotting v. Stock Yards Co.*, 183 U. S. 79, 95, 97; *Canada Southern Ry. Co. v. International Bridge Co.*, 8 App. Cas. 723, 731.

because it cannot otherwise earn a reasonable return upon the cost of its entire property; nor can a carrier be compelled to charge less than reasonable compensation merely because it may earn a large return upon the cost of its property. In determining what constitutes reasonable compensation for the service rendered in any given case, the aggregate profits of the carrier undoubtedly have a bearing and may be considered; but there are also many other elements that must be taken into account.

There are several reasons why the rates of a railway company cannot be fixed by Congress, or by a commission created by Congress, on the basis of the cost of the property of the company, or upon the basis of its income.

(a) It is an axiom of railroad rate-making that rates between the same points must be alike on all competing lines, because if they are not alike, the business will go to that line which makes the lowest rate. Therefore, in case two competing lines would not be equally prosperous if both should charge the same rates, it would be impossible to fix their rates in such manner as to yield to each the same relative net return upon the cost of the property. If the rates charged by the more prosperous company upon competitive business should be reduced so as to cut down its net income, the less prosperous company would be compelled either to reduce its rates equally or to lose all the competitive business, and in either event might be ruined.

(b) It would be impossible to fix the rates of a railway company on the basis of the net income upon its entire property so long as the regulation of rates for transportation wholly within a state remains subject to state control and not to the control of Congress. The Interstate Commerce Commission could deal only with rates upon interstate traffic and the states could deal only with rates upon traffic wholly confined within their boundaries. The Supreme Court of the United States has decided that when a state undertakes to prescribe rates of a carrier in respect of domestic business, it must do so with reference, exclusively, to what is just and reasonable as between the carrier and the public in respect of domestic business. For the same reasons, if the Interstate Commerce Commission should prescribe rates upon interstate business, it could consider only what would be just and reasonable in respect of interstate business. There is, therefore, no power competent to adjust and prescribe a complete schedule of rates on the basis of allowing a railway company to earn only what may be deemed a

reasonable net return on the original cost, or the cost of reproduction, of its property.¹

Moreover, even if Congress had constitutional power to withdraw from the several states all control over the railways engaged in interstate commerce and to regulate their local as well as their interstate rates, it is not probable that it would resort to so revolutionary a measure.

(c) While the original cost, or the cost of reproduction, of the property of a railway company, and the rates required to enable the company to earn a fair return upon this cost, are elements to be considered in determining whether a statute fixing maximum rates is unconstitutional because confiscatory, these are not the only elements.² The owner of property devoted to a public service cannot be deprived by law of the fruits of his skill, industry, and thrift; nor can he be deprived of an increment in value of his property due to the development of the country or to good fortune. The power to regulate charges in a business of a public character is not based on the ground that the legislature can prevent the owner of property used in this business from earning more than a specified profit upon the cost of this property. It is based on the ground that the legislature can prevent any individual or corporation engaged in a business of a public character from charging more than reasonable compensation for the services rendered.

¹ In *Smyth v. Ames*, 169 U. S. 466, 541, the Supreme Court of the United States said: "In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

² *Smyth v. Ames*, 169 U. S. 546, 547.

Neither a state nor the United States would have constitutional power to seize the net income of a railway company over and above such sum as the legislature or the courts may deem to be a reasonable return upon the cost of its property. The legislature could not require any such excess to be paid into the state treasury, nor could the legislature give this excess to shippers upon the railway.

It is to be observed in this connection that the railway companies have not received their franchises from the United States and that the United States has not conferred upon them the power of eminent domain. Although a state may base a power to regulate railway companies on the ground that they have assumed the performance of a function of the state by accepting the franchises and the power of eminent domain granted by it, the United States cannot base the power of regulation upon that ground. Accordingly, the rule laid down by Mr. Justice Brewer in *Cotting v. Kansas City Stock Yards Co.*¹ with reference to the power of a state legislature to regulate the charges of a stockyards company should be applied. It should be held that Congress, or a commission created by Congress, can declare, subject to review by the courts, what rates in respect of interstate transportation will pay a railway company reasonable compensation for its services; but that a railway company cannot, in any case, be deprived of the right to make such charge as is reasonable, having regard to the value of the service, and that it cannot be compelled to reduce its charges merely because the volume of its business enables it to earn large profits on its capital.

5. Railway rates, like the charges in any other business, are determined largely by considerations of business policy and cannot be fixed by the application of definite principles or hard and fast rules. Those who manage the traffic of a railway company must exercise a wide discretion in adjusting its tariffs from time to time to meet the ever changing requirements of trade and of business conditions. Many elements must be considered, besides the cost of transportation, such as competition by land and water, the volume and character of the business, the length of the haul, the rates that can be paid in competition with producers of similar articles at other places, the existence of return loads, etc. In many cases railway companies voluntarily fix their rates far below the

¹ 183 U. S. 79, 97.

maximum that would be reasonable and lawful, as when it is desirable to develop a new territory, or to encourage the establishment of a new industry, or otherwise to help build up some new source of traffic. In many cases they are forced, by reason of competition, either to make rates that would be ruinous if applied to all their traffic or to give up the competitive business entirely. Again, in other cases, they must accept minimum rates by reason of the long haul required to carry a product to market. It is rarely, if ever, true that there is but one just and reasonable rate for the transportation of a given article between two points. In nearly every instance there is a wide range within which any rate would be just and reasonable, and it is wholly a question of business policy at what point the rate shall be fixed within that range.

It would be utterly impracticable for a legislature, or a commission, to exercise intelligently the wide business discretion necessary to adjust railway rates to meet the varying conditions of trade. It would seem also that an act of Congress taking away from a railway company its business discretion in the adjustment of its rates would be unconstitutional, because depriving the company of its liberty and property without due process of law. However, the decisions of the Supreme Court indicate that the legislature of a state, or a commission created by a state legislature, can, to some extent, substitute its own business judgment for that of the railway companies in fixing their rates. In *Minneapolis, etc., R. R. Co. v. Minnesota*,¹ the Supreme Court said: "We do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular." Moreover, it has often been held that the courts will not interfere with a regulation of rates by the legislature, or by a commission, unless it appears that the rates prescribed are clearly so unreasonable as to make their enforcement equivalent to confiscation of property.² There is, therefore, a wide range between a rate so high that the courts will declare it to be unreasonable and illegal if imposed by a railway company, and a rate so low that the courts will declare it to be confiscatory if imposed by the legislature or by a commission.

This point has not always been borne in mind by the courts, and

¹ 186 U. S. 257, 267.

² *San Diego Land Co. v. National City*, 174 U. S. 754.

has very generally been overlooked in drafting the various bills introduced during the last session of Congress. The expressions "reasonable rates" and "unreasonable rates" are often used in very different senses. Thus, when it is said that a rate shall be reasonable, this may mean (1) that the rate shall not be unreasonably high and illegal under the common law and the Interstate Commerce Act, or (2) that the rate shall not be so low that a court would decide it to be confiscatory, or (3) that the rate shall be that particular rate which, in the discretion of a commission, or of some particular person, ought to be established between these two extremes. When it is said that a rate is unreasonable, this may mean (1) that it is unreasonably high and therefore illegal, or (2) that it is unreasonably low, or (3) that it is different from the rate which, in the opinion of a commission, or of some particular person, ought to be established between these two extremes.

6. To fix the rates to be charged by a carrier in the future is a legislative and not a judicial act. This has repeatedly been pointed out by the Supreme Court of the United States. In the *Maximum Rate Case*,¹ the Supreme Court used the following language:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future — that is a legislative act. . . .

"The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance."

7. Congress cannot confer judicial powers upon the Interstate Commerce Commission. It can confer judicial powers only upon courts established in the manner prescribed by the Constitution. The judges of such courts must be appointed to hold office during good behavior, and must receive for their services a compensation which shall not be diminished during their continuance in office. As will be pointed out hereafter, a judge can be required to perform only strictly judicial services.² The Interstate Commerce

¹ 167 U. S. 479, 499, 505. See also *Texas & Pac. Ry. Co. v. Interstate Com. Com.* 162 U. S. 197, 234.

² See point 9, *infra*.

Commission is vested with various non-judicial functions, such as the duties of procuring statistics and of prosecuting violations of the law. Congress could not confer strictly judicial powers upon a commission so constituted, nor could it give to such a commission power to adjudicate finally the lawfulness of a rate charged by the railway companies, or to impose fines or penalties.¹

8. Congress can confer upon a commission power to fix, subject to review by the courts, the maximum rates that would not be unreasonably high and extortionate as against shippers, but it is doubtful whether or not Congress can vest in a commission the purely discretionary power to fix rates as it sees fit. The Constitution provides that "*all* legislative powers herein granted shall be vested in a Congress of the United States," and the general rule is well settled that Congress cannot delegate its legislative powers to any other body.² It has never been decided that Congress can delegate to a commission the power of prescribing future railway rates, because Congress has never passed any law purporting to do so. In a number of the states, however, such laws, delegating to railway commissioners the power of fixing rates, have been passed, and their constitutionality has been sustained.³ These decisions are based upon the doctrine that while a legislature may not delegate its strictly legislative powers, yet it may delegate authority to regulate certain matters which in the nature of things require regulation of a quasi-administrative character and which, in the nature of things, could not be satisfactorily regulated by the legislature itself.⁴ According to these cases, while the power of fixing rates is a function of the legislature, it is a quasi-administrative function which may be delegated to a commission. In upholding

¹ *Interstate Com. Com. v. Brimson*, 154 U. S. 447, 485.

² Art. I. § 1. *Cooley*, Constitutional Limitations, 7th ed., 163. "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

³ *Georgia R. R. Co. v. Smith*, 70 Ga. 694; *Tilley v. Railway Co.*, 4 Woods (C. C.) 427; *McWhirter v. Pensacola Ry. Co.*, 24 Fla. 417, 471; *Express Co. v. R. R. Co.*, 111 N. C. 463, 472; *Chicago, etc., Ry. Co. v. Dey*, 35 Fed. Rep. 866.

⁴ See *Field v. Clark*, 143 U. S. 649, 692; *Buttfield v. Stranahan*, 192 U. S. 470.

the Railroad Commission Law of Georgia, Circuit Judge Woods used the following language:

"The true distinction therefore is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made."¹

No doubt, Congress can by law prescribe general rules for the regulation of the charges of railway companies—for example, it can (as it did in the Interstate Commerce Act) prohibit railway companies from charging unreasonably high or extortionate rates and can prohibit them from unduly discriminating in their charges; and it can establish a commission or other administrative body with power to carry into effect such general rules, including power to make orders fixing *prima facie* what rates shall be deemed unreasonably high or discriminatory and therefore illegal under the statute. Under such a law, the function of a commission would be merely administrative in carrying out the declared will of Congress to prohibit excessive or unjustly discriminatory rates, and the commission itself would not be vested with the legislative power of determining, according to its own arbitrary will or ideas of policy, what rates shall be charged in the future. Under such a law the action of the commission, although *prima facie* valid, could be reviewed and set aside by the courts, and the carrier could not be deprived of the right to charge any rate that would not be unreasonably high or unjustly discriminatory. Even if Congress itself has constitutional power to fix the rates of the railway companies according to its discretion, it would be going a step further to hold that it can delegate this discretionary power to a commission. As was pointed out by the Supreme Court, such a power is "a legislative power . . . of supreme delicacy and importance"² and would enable the Commission to make "laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy."³

9. Congress cannot vest in the courts power to fix future rates, or to consider and pass upon the wisdom or policy of the commission in prescribing a particular rate which is neither con-

¹ 4 Woods (U. S.) 427, 446.

² 167 U. S. 505.

³ 162 U. S. 234.

fiscatory nor unreasonably high. It is well settled that Congress cannot constitutionally require the courts to perform any duties that are not of a judicial character. It cannot require the courts, directly or indirectly, to perform duties of an administrative or of a quasi-legislative character.¹ It follows, therefore, that Congress has no constitutional power to require the courts to exercise the legislative or quasi-legislative power of a commission in fixing the rates to be charged by a railway company.² Congress has never attempted this, and the precise point, therefore, has not been decided; but a similar question has arisen under state legislation purporting to vest the rate-making power in the courts, and this legislation has been condemned as unconstitutional. In *State v. Johnson*,³ the Supreme Court of Kansas decided that the act of the legislature of that state creating a court called the "Court of Visitation" was unconstitutional for the reason that it conferred upon this court the power of prescribing the future rates of railway companies—that being a legislative and not a judicial function. The same conclusion was reached when the validity of this Kansas law was considered by the Circuit Court of the United States.⁴

If Congress cannot give to the courts original power to prescribe what rates the railway carriers shall charge, it cannot require them to reconsider the whole case as it was considered by the commission and to pass upon the wisdom and policy of the action of the commission in fixing a rate. In other words, Congress cannot constitute the courts, in substance, an Appellate Railroad Commission, and require them to substitute their own ideas as to the wisdom and policy of a rate for the ideas of the commission. Any statute authorizing the commission in the first instance to exercise purely discretionary power in fixing rates, and requiring the courts, upon reviewing this action, to exercise the same discretion as the commission, would be unconstitutional, because this discretion would be of a legislative and not of a judicial character. Such a statute would in effect constitute the courts the ultimate

¹ Opinions of the Judges of the Supreme Court in the notes to *Hayburn's Case*, 2 Dall. (U. S.) 409; *United States v. Todd*, 13 How. (U. S.) 52; *Gordon v. United States*, 2 Wall. (U. S.) 561; *Re Sanborn*, 148 U. S. 222; *Interstate Com. Com. v. Brimsen*, 154 U. S. 447, 484; *Norwalk Street Railway Company's Appeal*, 69 Conn. 597.

² See points 5 and 6 above.

³ 61 Kan. 803.

⁴ *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335. See also, *Nebraska Telegraph Co. v. State*, 55 Neb. 627, 636.

rate-makers for the railways in the United States. The courts undoubtedly can pass upon the question whether a rate is unreasonably high and therefore unlawful, or whether it is in violation of a legal order made by the commission. They can also pass upon the question whether the action of the commission in fixing a rate is constitutional, that is to say, whether it would in effect amount to confiscation of the property of the carrier; but they cannot be required to substitute their own ideas of wisdom or policy for those of the commission in fixing a rate which is neither confiscatory nor unreasonably high. The question in such a case would be neither a question of fact nor a question of law. The adjustment of the rates of a carrier between these extremes presents merely a question of business policy largely dependent upon individual opinion and preference. The carrier can pass upon this question; and possibly Congress, in the exercise of its legislative functions, can pass upon it. Possibly, also, Congress can empower a commission to do so. But the courts cannot be required to decide such questions and in effect to take charge of the traffic management of the railways.¹ This precise point was decided in the case of *Steenerson v. Great Northern Ry. Co.*² The act of Minnesota giving to the Railroad and Warehouse Commission of that state power to fix rates made provision for an appeal to the District Court, and contained the following provision: "Upon such appeal, and upon the hearing of any application . . . for the enforcement of any such order made by the commission, the district

¹ The following remarks of Mr. Justice Brewer in the case of *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, are instructive in this connection: "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or by a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates, prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

² 69 Minn. 353, 575; 72 N. W. Rep. 713. See also *In re Janvrin*, 174 Mass. 514.

court shall have jurisdiction to, and it shall, examine the whole matter in controversy, including matters of fact as well as questions of law, and to affirm, modify or reverse such order in whole or in part as justice may require; and in case of any order being modified, as aforesaid, such modified order shall, for all the purposes contemplated by this act, stand in place of the original order so modified and have the same force and effect throughout the State as the orders of said commission."

The Supreme Court of Minnesota held that

"If by this the legislature intended to provide that the Court should put itself in the place of the commission, try the matter *de novo*, and determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one. And the performance of such duties cannot under our constitution be imposed on the judiciary."

No constitutional statute can be drawn that will give to the courts power to hear the question *de novo*, as in case of an appeal of a cause in equity, and to reconsider the wisdom and policy of the commission in fixing any particular rate between the two extremes of legality referred to above. No statute would be necessary to give the railway companies power to resort to the courts in order to restrain confiscatory action of the commission, and no additional protection through the courts can be conferred by Congress. It follows, therefore, that a grant of power to a commission to fix rates, in its discretion, would vest in it practically autocratic power, subject to no control by the executive or by the courts, to dictate the policy of the railways of the United States, and autocratic power to make or unmake the prosperity of different sections of the country so far as this would depend upon the rates of transportation. It would place in the practical control of the commission property of a value of about \$12,000,000,000—the most important single property interest in the United States. It would create a form of bureaucratic government more absolute than any existing in any other country in the world. It would certainly be contrary to the American system of government and to American ideas of liberty.

The action of the commission in such a case would be subject only to the right of the carriers to resort to the courts to prevent confiscatory action. Provisions for a further judicial review would

be illusory. Under the bills that have been introduced in Congress, the only question that could be considered upon an appeal by a railway company would be whether the rate prescribed by the commission was confiscatory, and the only question that could be considered upon an appeal by a shipper would be whether the rate prescribed was extortionate or discriminatory. If a locality should be aggrieved by the action of the commission, probably it would not have any redress whatsoever.

10. A grant of discretionary power to fix railway rates within the limits of legality, as heretofore defined, would necessarily include power, through an adjustment of rates, to affect the relative rates of different localities and to aid one locality in the country at the expense of other localities by establishing a differential. In some of the bills introduced at the last session of Congress it is provided in express terms that the commission shall have power to prescribe "the just relation of rates to or from common points"; but irrespective of such provisions, the power to do this would necessarily result from any grant of a purely discretionary power of fixing rates.

The Constitution of the United States provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." In construing this constitutional prohibition it is to be observed, first, that it applies only to regulations of commerce by Congress and not to state legislation giving preferences to certain ports;¹ secondly, that it does not prohibit individuals or railway companies from voluntarily giving differentials or preferences to certain ports; and thirdly, that it applies to *all* regulations of commerce established by Congress, or by a commission created by Congress. An order of a commission fixing rates can be sustained only on the theory that it is a regulation of commerce by the legislature, acting through the commission, and, as has often been decided, such an order is subject to the same constitutional limitations as a regulation enacted by the legislature in the first instance. In the case of *Pennsylvania v. Wheeling Bridge Co.*² it was claimed that an act of Congress authorizing the construction of a bridge across the Ohio river at Wheeling, Virginia, was in violation of this constitutional prohibition, because the construction of this bridge would cause delay and expense in the operation of steamboats upon the Ohio river

¹ *Munn v. Illinois*, 94 U. S. 113, 135.

² 18 How. (U. S.) 421.

bound to or from the port of Pittsburg, and would virtually give a preference to the port of Wheeling. A majority of the court, however, held that the act of Congress was a legitimate exercise of the power to regulate commerce, although it might give an advantage to the ports of one state which would incidentally operate to the prejudice of the ports of a neighboring state, and that the constitutional prohibition prevented Congress only from giving a *direct* preference to the ports of one state over those of another. Mr. Justice Nelson also expressed the view that what was forbidden was not discrimination between the ports of different states, but discrimination between states, and that in order to bring the case within the prohibition it was necessary to show not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania. This latter view, however, is not tenable, as is shown by the discussion of the constitutional prohibition in *Knowlton v. Moore*.¹

It seems clear that an act of Congress regulating interstate commerce is not in violation of this prohibition merely because the regulation would incidentally, and not directly, give some advantage to the ports of one state over those of another state. The constitutional prohibition would forbid only a regulation of commerce directly and necessarily giving such a preference. The question, therefore, arises: Can a direct preference be given to the ports of one state over those of another through an adjustment of railway rates in the United States? Of course, the fact that railways were not known at the time of the adoption of the Constitution has no bearing upon the question. If a law prescribing the rates of railway companies is a regulation of commerce under section 8 of Article I., it must also be a regulation of commerce under section 9 of the same article.

It is obvious that an act of Congress, or an order of a commission, merely fixing the *maximum* rates that may be charged by railway companies in respect of shipments to or through certain ports, would not give a preference to the ports of one state over those of another, because the railway companies leading to each port could compete freely with those leading to other ports by reducing their rates. The establishment of a differential in favor of the railways leading to a certain port implies that the railways leading to other ports shall be prohibited from reducing their rates

¹ 178 U. S. 41, 104 *et seq.*

below a prescribed minimum, and that free competition among them shall thus be stopped. While, possibly, it may be held that the establishment of such a differential in respect of shipments between interior points and the cities situated at different ports would not necessarily give a direct preference to any port, because such shipments may not go through the ports, it seems clear that a preference would be given by a differential in respect of through shipments to or from foreign points. As the through rates in respect of shipments between the same points must necessarily be substantially alike by all routes, the obvious purpose of the differential would be to give to the steamship lines from certain ports a larger share of the through rate than the steamship lines from other ports. It is difficult to see how the courts could avoid recognizing the fact that the direct and necessary result would be to give a preference by statute to certain ports at the expense of others. It is no answer to say that a regulation of Congress, or of a commission, merely establishing "the just relation of rates" upon shipments by different ports, would not grant a preference to the ports of any state. Stated baldly, this would mean that Congress, or a commission, can take away from a particular port its natural advantages by granting a law-made advantage to other ports by means of a preferential regulation of commerce. The Constitution provides that no preference shall be given by *any* regulation of commerce to the ports of one state over those of another. To hold that Congress or a commission can by law give to the various ports such preferences as in the judgment of Congress, or a commission, will equalize their natural advantages would wholly destroy the value of the constitutional prohibition.

The constitutional prohibition was designed to prevent sectional legislation that might array one part of the country against another. The Interstate Commerce Act itself recognizes that the Commission is subject to politics, as the Act provides that not more than three of the commissioners shall belong to the same political party. One or the other of the great political parties will always control the Commission. If power to fix the relative rates of transportation to and from different ports or sections of the country is conferred upon it, the adjustment of railway rates in the United States will inevitably become a political question.

Victor Morawetz.

NEW YORK CITY.

SPECIAL LEGISLATION FOR MUNICIPALITIES.

THE constitutions of many of our states provide for general laws and prohibit special or local laws with reference to municipal corporations.¹ These provisions have been in force long enough for their results to be seen and stated.

Webster defines "general" as "Properly, relating to a whole genus or kind, and hence relating to the whole class or order"; and "special" as "Designating a species or sort." Other lexicographers give the same definitions. A clause in a constitution that legislation regarding municipalities shall be general, is a requirement that it shall relate to a genus and not to a species.

Genus and species are relative terms, and it is possible to divide the genus, municipal corporation, or county, city, town, village, borough, etc., into species, each of which species in turn will be capable as a genus of being divided again into other species, and so on indefinitely.² Thus the genus "all cities" may be divided into different classes according to number of inhabitants; as, for example, cities having 100,000 or less, cities having 100,000 to

¹ The Constitution of Ohio, for example (Art. XIII. Sec. 1), provides: "The General Assembly shall pass no special act conferring corporate powers." The Constitution of Illinois (Art. IV. Sec. 22) provides: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . incorporating towns, cities, or villages, or changing or amending the charter of any town, city, or village." The Constitution of New Jersey provides (Sec. VII. Par. 11): "The legislature shall not pass private, local, or special laws in any of the following enumerated cases; that is to say: . . . Regulating the internal affairs of towns and counties." Similar provisions exist in a great number of the constitutions of the various states.

² Professor Jevons ("Elementary Lessons in Logic" (1882) 98, 100) states: "Any class of things may be called a genus (*γένος*, race or kind), if it be regarded as made up of two or more species. 'Element' is a genus when we consider it as divided into the two species, 'metallic and non-metallic.' Triangle is a genus as regards the species acute-angled, right-angled, and obtuse-angled. On the other hand, a species is any class which is regarded as forming part of the next larger class, so that the terms genus and species are relative to each other, the genus being the larger class which is divided, and the species the two or more smaller classes into which the genus is divided. . . . It will easily be seen that the same class of things may be both a genus and a species at the same time, according as we regard it as divided into smaller classes or forming part of a larger class."

200,000, and cities having more than 200,000. Each of these classes is a species with reference to the genus "all cities," and each of them as a new genus may in turn be divided into new species. Such classification may be continued almost without limits, until approximately each municipality is placed in a separate class; and is as certainly designated as if mentioned by name. This classification according to population, with separate legislation for each class, has generally, though not uniformly, been sustained by the courts as not violating the constitutional requirement for general legislation.

Municipal corporations may also be divided according to other characteristics; for example, location on the seashore, on rivers, or inland not on rivers. Then in turn cities on the seashore may be divided according to population, or some other characteristic, and so on. Here "all cities" will be the genus with respect to the first division, namely, on the seashore, on rivers, and inland not on rivers, and each of these three divisions is a species; but in turn, each of these would become a genus of the next lower class, and so on indefinitely. Still another classification often resorted to singles out some particular thing like a public hospital, or a high school, or a floating debt. It is obvious that the legislature, by selecting some characteristic of the city for which legislation is desired, may readily make a class which shall embrace only such city.

When, therefore, the constitution of a state provides that all laws with respect to municipal corporations shall be general, it is only saying that such laws shall be enacted with respect to some genus. What genus is meant, or how the genus shall be determined, the constitutions generally do not state, although some of them expressly provide for a classification by population. The courts, accordingly, in the numerous cases which have arisen, have been compelled to determine what genus is permissible. One possible view is that all legislation with regard to cities must apply to all cities in the state. This view would have in its support the proposition that the clause in the constitution is to be given an effect as broad as the territory over which the constitution extends. Very few courts, if any, have taken this stand. If legislation may be had with respect to fewer cities than all, classification is necessary. Such classification might be left wholly to the legislature, the only requirement being that it should mark out a genus of some kind. In short, while it might not mention a particular city by name, it

might in general language so describe such city as to make certain that the law would apply to that one only.

A striking instance of this kind of "general legislation" (though not relating to municipalities as such) arose under that clause of the New York Constitution which provides: ¹

"The legislature shall not pass a private or local bill in any of the following cases: . . . Granting any corporation, association, or individual the right to lay down railroad tracks."

Section 36 of the Railroad Act of 1875, commonly known as the Rapid Transit Act, made certain provisions with reference to "any elevated steam railway or railways now in actual operation," permitting the company owning such railway to lay down certain additional tracks. There was only one railway which answered this description, and the legislation applied, and was intended to apply, only to this railway. The Court of Appeals held that the law was general.² This decision has been taken as deciding that classification is a matter of almost, if not quite, unlimited legislative discretion.³ If it is unlimited, the clause in the Constitution has obviously no effect.

¹ Art. III. § 18.

² *Matter of Elevated Railway*, 70 N. Y. 327, 350.

³ In the *Matter of Church*, 92 N. Y. 1, the Court of Appeals held that an act giving the Board of Supervisors in any county containing an incorporated city of over 100,000 inhabitants, where contiguous territory in the county has been mapped out into streets and avenues, power to lay out and open the same, is not a local law within the meaning of the state Constitution, Art. III. § 18, prohibiting the passage of a local or private law for laying out or opening highways.

So also in the *Matter of New York & Long Island Bridge Company*, 148 N. Y. 540, notwithstanding the provisions of Art. III. § 18 of the Constitution, prohibiting local legislation granting to any corporation the right to lay down railroad tracks, the court held the following act valid: "Any company incorporated for the purpose of constructing and maintaining a bridge or bridges over any river, bay, arm of the sea, or other body of water, connecting any city in the State of New York, containing more than one million inhabitants, with any other city in said state, is hereby empowered to lay tracks and operate a railway upon such bridge or bridges" (Chap. 225, Laws of 1893).

Judge O'Brien, in his dissenting opinion in the *Matter of Henneberger*, 155 N. Y. 420, 435, states, with regard to this act, what was common knowledge: "There never was the least doubt that the law was intended for but one place in the state, and that was a bridge across the East River from New York, and yet this Court held it to be valid as a general law." The same judge states, in the same case, p. 436, with reference to the act involved in the *Church* case, *supra*: "Indeed the later case was intended and admitted to be a law for a single county, since the conditions existed in no other county."

The utter uselessness under the above cases of the clauses in the New York Constitution prohibiting local legislation, has apparently led the Court of Appeals to

For many years the Ohio legislature, with the sanction of the courts, classified municipalities according to population to such an extent as to be equivalent to legislation by name. The Revised Statutes provided:¹

"Municipal corporations are divided into cities, villages, and hamlets; cities are divided into two classes, first and second; cities of the first class are divided into three grades, first, second, and third; cities of the second class are divided into four grades, first, second, third, and fourth; cities of the second class, which hereafter become cities of the first class, shall constitute the fourth grade of the latter class; and villages, which hereafter become cities, shall belong to the fourth grade of the second class."

The next two sections divided cities of the first and second classes into grades, according to population, so that Cincinnati, Cleveland, Toledo, Columbus, and Dayton were each the only cities in their respective grades. Sandusky, Springfield, Hamilton, Portsmouth, Zanesville, and Akron were the only cities in the third grade of the second class, and all others were in the fourth grade. It would be a mistake, however, to suppose that legislation for even these last cities was uniform. I have taken up at random a volume of the session laws of Ohio — the one for 1892 — and on page 144 is an act as follows:

"that in any city which at the federal census of 1890 had, or which at any subsequent federal census may have, a population of not less than twenty-

modify the rule that it will not interfere with the legislative discretion in the matter of classification, for in the *Matter of Henneberger*, 155 N. Y. 420, that court, by a vote of four to three, held an act to be local and invalid although it was expressed in general language. The act in question (Chap. 286, Laws of 1897) provided: "In any town having a total population of eight thousand or more inhabitants and containing an incorporated village having a total population of not less than eight thousand and not more than fifteen thousand inhabitants, except in the County of Madison, any five or more persons holding lands adjoining or abutting on any highway, which extends within the limits of such town and without the limits of such incorporated village for a distance of at least two and one-half miles, may present to the Supreme Court at a Special Term thereof, to be held in the county containing such town, a petition for the appointment of three commissioners for the purpose of widening and improving such highway or a specified portion thereof not less than two miles and a half in length, such miles being wholly without the limits of such incorporated village." This attempt was more than the Court of Appeals could endure. The act applied and was intended to apply, only in the town of New Rochelle. Just how far this court will exercise control over the power of the legislature to make classifications for the purpose of general legislation remains to be seen. This New Rochelle act appears to have been a little more clumsy than some of the so-called general laws which have been sustained by the same court, but, as Judge O'Brien shows in his dissenting opinion, it was no more specific than the acts in the other New York cases above cited.

¹ 1890, § 1546.

six thousand (26,000), and not more than thirty thousand (30,000), the City Council may by resolution," etc.,

giving authority to issue bonds for police equipment. Printed on the margin in this official volume are the words "Akron and Canton," and these were the only cities to which the act applied. Villages, too, were put in different classes, but it would be a mistake here also to suppose that all legislation as to each class was uniform. The very next act after the one last mentioned is as follows:

"that any village of the State of Ohio which at the last federal census had, or which at any subsequent federal census may have, a population of not less than eight hundred and sixty (860), nor more than eight hundred and seventy (870), be and is authorized to issue its bonds," etc.;

and printed in the margin is the word "Malta," indicating the only village to which the act applied. Many other such instances might be cited.¹ So for a long series of years Ohio had numerous similar statutes, which under decisions of the Supreme Court were general laws. It is hard to see what advantage this cumbrous system has over legislation for municipalities by name.

These are examples of the kind of legislation which has existed more or less in most states whose constitutions require general legislation as to municipalities. The Ohio statutes are perhaps extreme cases, but the principle on which they rest is supported by decisions in the courts of other states.

In 1874 the Pennsylvania legislature passed an act dividing cities into classes, which, among other things, provided that "cities containing a population exceeding 300,000 shall constitute the first class." It was well known that the only city embraced in the first class was Philadelphia, yet the Supreme Court held that legislation which applied only to that class was general.²

The courts of some of the states, seeing that such classification and legislation are in effect legislating for particular cities, have sought to state some reason to justify them. Among other rules is one which may be called the "growing" rule. This is based on the idea that legislation for municipal corporations is a distribution of favors in which all are entitled to participate, and if all are

¹ Other acts applied to any municipality which had at the last federal census the definite number of inhabitants specified in such acts respectively. These acts were held invalid when the "growing" rule hereafter mentioned was adopted.

² *Wheeler v. Philadelphia*, 77 Pa. St. 338.

fairly treated, the law is to be regarded as general. Therefore a classification according to population is valid which treats alike all cities which now have or hereafter may have a certain population. The provision which makes such legislation apply to all cities which hereafter may have the prescribed population is supposed to relieve it from any objection. It matters not that the cities may not actually grow to have such a population; the mere possibility of such growth is sufficient.

"Legislation is intended not only to meet the wants of the present, but to provide for the future. It deals not with the past, but, in theory at least, anticipates the needs of a state healthy with a vigorous development. It is intended to be permanent. At no distant day Pittsburg will probably become a city of the first class; and Scranton, or others of the rapidly growing interior towns, will take the place of the city of Pittsburg as a city of the second class. In the meantime is the classification as to cities of the first class bad because Philadelphia is the only one of the class? We think not. Classification does not depend upon numbers."¹

That sounds plausible. But if the learned justice really thought, as no doubt he did, that "at no distant day Pittsburg will probably become a city of the first class," he reckoned without his host, for the legislature has taken good care that it shall not. When the population approached such numbers that it was at all likely to become a city of the first class, the legislature provided for a new classification by which cities of the first class should be "those containing a population of 600,000 or over";² and later, in order that it might not grow into this class, made still another classification providing that the first class should consist of cities "containing a population of 1,000,000 or over."³ How long, at this rate, will it take Pittsburg to become a city of the first class?

When a court says that the classification of cities according to population is permissible, because other cities may grow into the higher classes, it is, in fact, speaking of a classification of cities which do not exist and may never exist, that is, of other cities which have the required population. It is a classification of mere possibilities. As to cities actually in existence, the classification is the same as if they were called by name, and it is kept such that, as to

¹ Paxson, J., in *Wheeler v. Philadelphia*, 77 Pa. St. 338, 349. See also *State v. Hawkins*, 44 Oh. St. 98; *State v. Anderson*, 44 Oh. St. 247; *Johnson v. Milwaukee*, 88 Wis. 383; *Alexander v. City of Duluth*, 77 Minn. 445; *Walker v. City of Cincinnati*, 21 Oh. St. 14.

² Act of May 8, 1889 (P. L. 133).

³ Act of June 25, 1895 (P. L. 275).

all others, it always remains a classification of mere possibilities. In other words, the reason given by the court is a transparent fiction. As well might a promise be held out to a dwarf that he shall receive some good thing when he grows to be a giant as to hold out to small cities a promise that a statute which applies only to cities having a million or more inhabitants, will confer certain powers on them when they grow to the same size.

Classification by population, moreover, is necessarily arbitrary. A difference of one in the number of inhabitants cannot make different legislation necessary or appropriate. To say that a line must be drawn somewhere, is to beg the entire question.

After such decisions by the Supreme Court of Ohio for more than a score of years, and after municipalities had for this long time carried on their affairs under such legislation, levying taxes and assessments, creating liens and affecting titles, and borrowing money, that court suddenly, in the year 1902, made a series of decisions holding all such legislation special and invalid. An act passed April 14, 1900, which provided "that any city of the third grade of the first class may . . . construct . . . a bridge or bridges across any navigable river or rivers passing into or through such city,"¹ etc., and one which provided for "the appointment, regulation, and government of the police force in cities of the third grade of the first class,"² were held unconstitutional. A similar decision was rendered for the same reason in respect of an act which was intended to relate only to the city of Cleveland.³ This was in June, 1902. The court, however, perceiving that a judg-

¹ *Platt v. Craig*, 66 Oh. St. 75.

² *Ohio ex rel. v. Jones*, 66 Oh. St. 453. The court says, p. 483: "The act is said to be general and not special, because it provides for 'the appointment, regulation, and government of a police force in cities of the third grade of the first class. That it affects no municipality in the state except Toledo is admitted. But the fact is said to be immaterial, because of the classification of cities by the General Assembly, and the doctrine formerly applied by the courts to such classification.

"That there has long been classification of the municipalities of the state is true. It is also true that while most of the acts conferring corporate powers upon separate municipalities by a classified description, instead of by name, have been passed without contest as to their validity, such classification was reluctantly held by this court to be permissible."

The court then stated that originally the laws making classification contemplated that on an increase of population municipalities should pass from one class to another, and that the classification should be permanent; but that under subsequent legislation municipalities did not by mere growth pass into another class; and it therefore concluded that under such classification the act was special.

³ *State ex rel. Attorney General v. Beacom*, 66 Oh. St. 491.

ment of ouster against the city of Cleveland on the ground that all the legislation under which it had existed for years and was then exercising its corporate powers was unconstitutional, might work great public harm, made an order suspending execution until October, 1902. A similar *quo warranto* might have been successfully prosecuted against every city in the state. To meet the emergency, a special session of the legislature was called in August, 1902, at which substantially all the laws with respect to municipal corporations were repealed and a new and elaborate municipal corporations act of 231 sections was adopted.¹ The construction of this new statute is apparently not very clear, for the Court of Common Pleas construed it one way and was affirmed by the Circuit Court, but the Supreme Court pointed out what it held to be errors of these two lower courts and reversed both their judgments.²

Another doctrine has arisen, which might be called the "germane doctrine." Some courts in attempting to find a principle on which to ground their review of legislative classification have announced the rule that this classification must be *germane* to the purpose of the legislation.

"The true principle requires something more than a mere distinction by such characteristics as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such nature as to mark the objects so designated as *peculiarly requiring exclusive legislation*. There must be a substantial distinction having a reference to the subject matter of the proposed legislation between the objects or places embraced in such legislation or the objects or places excluded."³

Observe that the courts state that this is a rule which the legislature ought to follow, and they will themselves look into the question of the necessity and propriety of a statute in order to determine whether or not it conforms to the rule. There are at least two objections to this: First, it is not a proper function of a court to determine what legislation is necessary or proper; that is emphatically the function of the legislature; second, it is impossible as a matter of practice for the legislature to conform to any such rule. Even if it were possible for its members to understand the test as stated by the courts, it would still remain for the

¹ Laws of Ohio, Special Session 1902, p. 20.

² *Zumstein v. Mullen*, 67 Oh. St. 382.

³ *State v. Hammer*, 42 N. J. Law 436, 440.

courts ultimately to determine whether the legislation was necessary or proper for the class of municipalities for which it was attempted. It is thus uncertain whether a given statute is constitutional until its necessity or propriety has been judicially reviewed. The legislature, on its information, and the courts, on theirs, might very well come to different conclusions.

As an example of the application of the germane rule may be mentioned a New Jersey case¹ in which the Court of Errors and Appeals decided that the School Act of March 23, 1900, was special legislation, although the Supreme Court had held that it was general. The act provided one method of government for schools in municipalities divided into wards and another for schools in those not so divided.²

The effect of this rule as administered by the courts, is that the classification of municipal corporations and to some extent the subject matter of the legislation must be such as the courts think proper. They have apparently supposed that by this formula they are laying down a principle of law as to the construction of the statutes, but an examination of the decisions must convince the reader that if they are not really deciding as to the propriety of the legislation, the boundary line between the two is neither well defined nor capable of definition. The actual administration of this rule makes chaos in the statute law of a state, as is shown by numerous other cases in New Jersey and by the condition of the statute law there.

If the courts are at liberty to look into the question of the necessity or propriety of a statute to see whether its classification is germane to its purpose, then there may possibly be some ground for their going further and examining whether as a matter of fact, as well as of form, the legislation is as general as the necessity or propriety. The Supreme Court of Minnesota went to this extent in holding a law entitled "An Act to provide additional means for completing and furnishing the court house and city hall building now in process of erection in the city of

¹ *Lewis v. Jersey City*, 66 N. J. Law 582.

² The court in its opinion said, p. 586: "The classification must rest on some characteristic or peculiarity plainly distinguishing the places included from those excluded and making the legislation *fit and appropriate* to those included and inappropriate to those which are omitted. It must embrace all, and exclude none whose conditions and wants render such legislation equally appropriate to them as a class." P. 588: "The division of municipalities into wards has no relation whatever to the management and control of public schools and the support of education."

Minneapolis, and to authorize the issue and sale of bonds therefor," was general.¹ On the first argument, the attorneys as well as the court apparently assumed that the act was special, the discussion being as to whether or not it was an act "regulating the affairs of any county or city." The court held that it was, and hence was void. On re-argument, the position was taken by counsel that the act was general, and the court so held. Their reasoning is interesting, to say the least.² They went beyond the mere form and looked into the substance of the legislation to see whether it was general in fact, — that is, whether it applied to all cases of the kind which existed in the state; and as they found that the combination of unfinished county court house and unfinished city hall existed only in Minneapolis, they held that it was general. If such reasoning be valid, it is a little difficult to see how there can possibly be any such thing as special legislation. "Special" means belonging to or relating to a species; and if legislation which applies to a particular city by name and applies to that city because it is different from every other city, is not special, then special legislation would seem to be a myth.

The legislatures of some of the states, impressed with the fact that the people of a particular city may need legislation specially applicable to such city, have arrived at the following solution of the matter: Whenever any city desires legislation peculiarly adapted to itself, it applies to the legislature and has an act passed, which in terms includes all cities in the state, but contains

¹ Laws of Minn., 1893, c. 243; State *ex rel.* Commissioners *v.* Cooley, 56 Minn. 540.

² The court said, p. 552: "The last proposition to which we will refer is that the character of an act as general or special depends on its substance, and not on its form. It may be special in fact, although general in form; and it may be *general in fact*, although special in form. The mere form is not material. To illustrate, suppose mountains were one of the subjects on which special legislation was prohibited, and that there was only one mountain in the state; a law referring to that mountain by name would be special in form, but general in fact, according to all the rules." P. 554: "Inasmuch as courts will in such cases take judicial notice of all facts bearing on the constitutionality of the law, we know that this is the only case of the kind — the only member of the class — which now exists, or ever can exist; for, under the constitutional amendment of 1892, no other special law like that of 1887 can be enacted. Hence the classification is complete. Again, the legislation [providing funds to complete the building] is confined to matters connected with and peculiar to the distinctive features of the case; or, in the language of the rule, the characteristics forming the basis of the classification are germane to the purpose of the law. Finally, as we have already seen, the facts that the law is special in form, and that it applies to only a single object, or, in the language of another rule, that the class consists of only one member, are not important. Our conclusion is that the act, although special in form, is general in fact, within the meaning of the constitution."

a clause that it *shall apply to such cities only as by vote of the people shall adopt the same*. Under this legislation there are in New Jersey several complete incorporation acts, each of which states that it is applicable to all cities in the state, and also that it is not applicable to any city except those which adopt it. Pickwick himself could not do better. No other city adopts the act, or cares anything about it, but each one may have its own similar act passed. The courts have solemnly declared that such legislation is general.¹

Another method of obtaining legislation to meet the needs of a particular city is as follows: An act is drafted containing complete provisions with respect to some subject, and in terms is made to apply to all cities, but somewhere there is a clause which provides that it shall not be construed to repeal any other act on the same subject.² The result is that there are a multitude of general acts on the same subject, each applying to all cities. Any city can take its choice, and if it does not find one to suit, can have another passed.

The New Jersey courts have, among other numerous decisions, announced the principle that any law which applies to all cities in the state is general; so likewise any which applies to all townships, to all counties, or to all boroughs. The reason given is that any law which applies to all the members of a "common law" class of municipalities is general.³ "The common law classification of municipalities" has a plausible sound, but there is no such thing. Municipalities are things of statute or charter creation, or,

¹ *In re Cleveland*, 22 Vr. (N. J.) 319, 23 *ibid.* 188. Chief Justice Beasley, giving the opinion of the Supreme Court, said, with respect to the limitation of time within which the act must be adopted: "It is true that this provision may eventuate in the production of different local results, but such outcome is not the necessary effect of the law, and there is no indication that such an end was in view. This law is capable of coming into operation within the prescribed time in every city of this state. It is, therefore, within the meaning of the Constitution, a general and not a local act, for, as has been just said, it must be regarded either as general or special at the time of its enactment, and it is not to be ranked in the former class by reason of the fact of its subsequent general adoption nor in the latter class because of its partial rejection."

The Court of Errors and Appeals declined to pass upon the validity of the proviso which limited the time for the election to some time prior to October 1, 1890, as, in its opinion, it did not need to pass upon that proviso in order to sustain the validity of the act and what was done under it with reference to Jersey City in the case then before the court.

² When this clause of non-repeal is omitted, as it frequently is, the task of construing and reconciling the vast mass of general laws on the same subject becomes well-nigh impossible.

³ *Hermann v. Guttenberg*, 63 N. J. Law 616.

in rare instances, possibly, in England existed by prescription, presupposing a grant of a charter. They are not common law creations. If they were, they ought to be alike in the different states having the common law. In New Jersey there are towns, townships, and boroughs, but in the New England states, in which there can be no denial that the common law exists, the municipalities known as boroughs or townships or villages with village governments are things almost, if not quite, unknown. It is not obvious, therefore, with what propriety the New Jersey courts speak of the "common law" classification of municipalities. They may mean such municipalities as are "common" in New Jersey. But municipalities in the State of New Jersey, counties perhaps excepted, are subject to be created, altered, or destroyed by the legislature, and the same is true in other states. Suppose there is a statute that applies to all cities and it is desired to have such statute apply to one borough but not to all boroughs. Under this "common law" rule legislation applying to all cities and to only one borough would not be permissible, but the legislature changes the name from borough to city, and, presto, the legislation applies to the borough under the name of city. Clearly the constitution in providing that there should be only general laws did not intend to make the application of this clause depend upon a mere matter of names, which the legislature might change as often as it would.¹ It may be said that the legislature might not resort to any such change, but we are now speaking of a clause which is to be binding upon the legislature, and not of a matter in their discretion.²

Such a question might arise in any state where the constitution in prohibiting special laws uses the generic term "municipal corporations," or any other similar one. For instance, the courts might be called upon to decide whether or not a law applying to all "cities," or to "all villages," but not to other municipal corporations, would be general.

We have seen some of the rules which the New Jersey courts have stated with reference to permissible classifications; also some of the legislation which under these rules has been held valid. A multitude of statutes also have been held invalid, and a multitude of other questionable statutes have not been passed upon. The

¹ Probably the authors of this clause in the constitutions gave little thought to the mischievous results which it would produce.

² See the earlier case, *Borough of Hightstown v. Glenn*, 47 N. J. Law 105, where a different rule was stated.

total result of this experiment has been an enormous mass of legislation. The Revised Statutes of New Jersey for 1895 comprise three immense volumes, and since that date the session laws contain a great number of so-called general laws. To say that the statutes constituting the municipal law of New Jersey are in great confusion is to state the matter much too mildly.¹ When one remembers that a great modern city raises and expends each year many millions of dollars, and is frequently incurring large obligations for public improvements, making contracts, issuing bonds, levying taxes, creating liens, and affecting land titles, it is obvious that that certainty is a fundamental requisite.

The Legislature of New Jersey² recently undertook to provide for a comprehensive system of public schools, having some regard to existing conditions in the various municipalities of the state. Their act came before the Supreme Court,³ and three judges held it valid. On writ of error a majority of the members of the Court of Errors and Appeals held it special and invalid. This decision would have stopped the public schools in the entire state. A special session of the legislature was called in October, 1903, to provide some new law, and the legislature then made another attempt to pass a general one. If the higher courts of a state find it difficult to know what is a general statute, how much less ought the

¹ The writer had occasion recently to examine some of the laws affecting the city of Hoboken, New Jersey, and among others he examined a compilation entitled "Charter of the City of Hoboken, together with the General Laws affecting the City," making 850 printed pages. As a practical illustration of the bewilderment of the profession in dealing with the constitutional clause permitting only general legislation, the preface to this compilation is very interesting, — the more so as it was obviously written with no idea that it would ever be quoted in an article like the present. It is as follows:

"The constitutional inhibition which renders special legislation inapplicable to cities is the compiler's principal, yet ample, apology for the dimensions of this work and the delay incident to its production. The legislation specially applicable to the City of Hoboken under the guise of general laws is in the main problematical. Whether the laws relating to cities contained in this compilation will in each instance prove applicable to Hoboken, or stand the test of the constitutional mandate, can be determined with certainty only after presentation to the judicial power. The compiler's aim has been (and it is hoped that in this respect he has met with some measure of success), out of the vast mass of uncertain and incongruous material before him, to cull and compile in a manner at once orderly, clear, and comprehensive to the citizen and official, such laws as in the opinion of the reviser may probably affect the city.

"JAMES F. MINTURN,

"Counsel to the City of Hoboken."

"Dated October 1st, 1890.

That was in 1890. Since that date confusion has become "worse confounded."

² "An Act to establish a system of public instruction," approved March 26, 1902.

³ *Riccio v. Mayor, etc., of Hoboken*, 54 Atl. Rep. 801.

average lawyer to know; and how much less still ought the average legislator to be expected to be wise enough to enact general statutes.

Legislation for municipalities ought not to be a set of general rules drafted for some Platonic Republic or Utopia, but ought to be such as will meet the actual needs of a real community. Not all cities in a state are alike, nor are any two cities alike merely because they have nearly the same population. One may be a manufacturing city, another may contain a large university, and still others may be mining cities, seaports, summer resorts, or seats of government. Moreover, a city may be a combination of some or all of these different kinds; and those which are about equal in population and in other respects may vary as to the education, wealth, and character of their inhabitants. No sane man would say that all such cities needed the same legislation.

Furthermore, certain peculiar conditions may arise necessitating special legislation which would be inapplicable to cities at large. Take, for example, the city of Galveston, which in 1900 was devastated by a tropical storm. Peculiar problems arose with reference to the health of its inhabitants, its ability for a time to meet the payment of interest on its bonds, and its protection, rebuilding, and welfare in the future. It is the height of absurdity to suppose that any such emergency could be properly met by general legislation. Fortunately the Constitution of Texas permits the enactment of special laws for cities having over 10,000 inhabitants, and immediately after this disaster, Galveston obtained a new charter with special provisions to meet the emergency. This is one instance. The recent fire in Baltimore and the great fires in Chicago and Boston might well have created the necessity for legislation wholly inappropriate to any other city. Again, take the instance, familiar to the citizens of New York, of the necessity for underground railroads. How absurd it would be to enact such legislation for all the cities in the state! Instances like these might be multiplied.¹ There is no good reason why the necessary legislation should not be in the form of a special law. Even if the constitution has a clause prohibiting such laws, the

¹ This need of municipalities for special legislation has been recognized by the courts in states having such clauses in their constitutions, as well as by others. In *Wheeler v. Philadelphia*, 77 Pa. St. 335, 350, Mr. Justice Paxson, giving the opinion of the court, said: "If the classification of cities is in violation of the Constitution, it follows, of necessity, that Philadelphia, as a city of the first class, must be denied the legislation

history of the past shows that some way will be found to make so-called general legislation fit the case, but nobody for an instant supposes that such legislation is really general in any proper sense.

There is a desire among a certain class of idealists to reduce law to a set of general rules applicable to all conditions for all time, and to dispense with special legislation for particular needs. It is such a delusion as this which has led people to think that there could be one set of general laws for all cities or great numbers of cities. In actual practice such a programme has always failed and always will fail. Each municipality has its own physical location, its own people, industries, needs, and desires; and to suppose that any one is capable of writing a general law which will provide for all those special needs is absurd. It is sufficient to recall how legislation originates. Some municipality finds it necessary or proper to have certain laws passed to meet some actually existing situation. No other municipality has the same need or cares to have the same law enacted, but each in turn has its own needs. In this country, where the people love liberty, and liberty for each community to develop along its own lines, why should the constitution say, "You cannot have this law unless it is enacted for every other community in the state," although no other needs or desires it? The legislation which a community desires is generally obtained. So that this vision of the idealists, which is a mere vision and must always remain so, has accomplished little more than to bring upon legislatures, and to some extent upon courts, the odium of practically disregarding the constitution. The effect upon public morality cannot be anything but harmful.

It may be asked what remedy is proposed for these evils. In the opinion of the writer, the answer is plain, namely, a return to the good old-fashioned system of special legislation for municipalities; not that all legislation ought to be special, but that the legislature should be free to enact such legislation if in its judgment the circumstances make it necessary or appropriate. For this purpose the restrictive clauses in the state constitutions should be repealed. When a city asks for legislation peculiar to its needs,

necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. For if the Constitution means what the complainants aver that it does, Philadelphia can have no legislation that is not common to all other cities of the state. And for this there is absolutely no remedy but a change in the organic law itself."

why require the legislature to go through the circumlocution of using general words? Why not mention the city by name, and state exactly and specifically what the legislation is? Why not label it so that people will know what it is intended to accomplish? The sham of so-called general legislation does not deceive the legislators, the people, or the courts. Moreover, it is open to the objection that it is an apparent attempt to conceal the true nature of the legislation, and it may be that under the guise of general laws many things have been inserted in our statutes that could not have found a place there if they had been plainly labeled.

The open and honest way when a municipality desires a special act is to apply for it and have the legislation enacted by name. If desirable, the constitution might provide that whenever a special act in reference to a municipality is requested, notice thereof should be published in some newspaper in the place to which it is to apply. This would give an opportunity for public sentiment to express itself, and in the long run the legislature could not enact any special laws which were not acceptable to that sentiment.

One of the most serious objections to having a constitution prohibit special legislation is the uncertainty and difficulty which is thereby introduced into the administration of municipal laws. Under the old system of special charters and special laws it was fairly easy for a practising lawyer to examine the charter of a city, its amendments, and its special laws within a reasonable length of time, and to form a fairly definite conclusion. Now under such a prohibition, he must examine, first, the special charter and its amendments (for generally the clauses in the constitutions did not repeal special charters and did not require the legislature to repeal them), and second, all the voluminous general laws of the state with reference to municipalities; and he must make up his mind if he can, first as to what general laws are by their terms applicable; then as to whether the special charter provisions, if any, govern, or whether the general law provisions, if any, govern; and finally as to which one of numerous general laws applies. But this is not all. On top of these difficulties comes the question whether the so-called general legislation is really "general." To determine this, he must make careful examination of the statute and of the numerous decisions of the courts, which have adopted various principles of interpretation, and which are themselves by no means easy to interpret. It frequently happens as a result of such an exhaustive and exhausting examination that he must advise his clients that it

is not safe to act until the particular statute which is the subject of investigation has been reviewed by the courts. What is the compensation for all this uncertainty? Absolutely nothing. Even if the so-called general laws were in form general, it would be a mere worship of formalism.

Harry Hubbard.

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PRIORITY OF SUBSEQUENT CREDITORS OVER A MORTGAGE. — When a quasi-public corporation has been put into the hands of a receiver, two general classes of unsecured claims may be preferred to those secured by a mortgage of corporate assets: viz., liabilities incurred by the receiver or his agents; and certain antecedent obligations of the corporation, which fall into three groups: (1) claims arising out of the operation of the business, such as wages, rents of leased property and price of rolling stock;¹ (2) claims contracted in preserving the property;² and (3) under extraordinary circumstances claims for money used in improving the property.³ The reason for preferring debts due from the receiver is evident. He is an officer of the court; his liabilities are the liabilities of the court; and the court protects itself by expressly requiring that all obligations created by him in the duties of his office shall be paid first.⁴ But the ground for giving priority to claims arising before the receiver is appointed is not so apparent. Since such preferences have been confined to cases of receivership of quasi-public corporations, it has been suggested that judicial discretion to impose conditions in appointing a receiver,⁵ or the interest of the public in having the business continued, furnishes the justification.⁶ It must

¹ Taylor v. Phila., etc., R. R. Co., 7 Fed. Rep. 377.

² Lee v. Penn Traction Co., 105 Fed. Rep. 40c.

³ Claims for personal injuries are not preferred. Farmers', etc., Co. v. Detroit, etc., Co., 71 Fed. Rep. 29.

⁴ See opinion of Lord Turner in Morrison v. Morrison, 7 De G. M. & G. 214, 226. So claims arising from the receiver's negligence are preferred. Cowdrey v. Galveston, etc., R. R. Co., 93 U. S. 352.

⁵ Farmers', etc., Co. v. Kansas City, etc., Co., 53 Fed. Rep. 182.

⁶ Union, etc., Co. v. Illinois, etc., Co., 117 U. S. 434.

be clear, however, that judicial discretion should be exercised, not at the caprice of the chancellor, but on equitable principles; and that the interest of the public can be no excuse for impairing the obligation of the mortgagee's contract or for depriving him of his security without due process of law. The rule finds its strongest support in the analogy from admiralty where claims for seamen's wages, salvage, and repairs are given priority over the mortgage lien.⁷ In all three groups of cases where preferences are permitted, as in these admiralty cases, the debts are based upon considerations which have resulted in direct benefit to the mortgagee; and it is believed that the true principle underlying the decisions is the equitable doctrine of unjust enrichment. Where the subsequent creditor preserves or increases the value of the security, the law implies a promise by the mortgagee to allow such creditor priority.

It must be admitted, however, that some cases will not square with this theory. For example, the United States Supreme Court recently refused to give preference to a claim arising from the preservation of the road, and distinguished such claims from those incurred in its operation. *Gregg v. Metropolitan Trust Co.*, U. S. Sup. Ct., March 6, 1905. Furthermore, there is a wide conflict of authority as to the time before the appointment of a receiver within which claims must have accrued in order to receive preference. Some cases leave the matter to the discretion of the court,⁸ while others fix the limit variously at a reasonable time,⁹ six months,¹⁰ or the period of the statute of limitations.¹¹ If the ground on which the preference is given is the unjust enrichment of the mortgagee, the right to the preference should vanish only when the benefits are no longer appreciable at the time the receiver is appointed.¹² The situation is analogous to that where money is deposited in a consciously insolvent bank. The depositor is preferred so long as the deposit can be traced in the increased assets of the bank. And finally, if this theory of quasi-contract were logically applied there would be no reason for limiting the rule allowing preferences to cases where a receiver is appointed and the corporation is a quasi-public one.¹³

PERFECTING AN INCHOATE RIGHT AS A PREFERENCE. — Bankruptcy Acts usually provide that transfers of property made within a prescribed period before the filing of the petition in bankruptcy shall be deemed preferences if they result in giving to one creditor a greater portion of his debt than to other creditors of the same class. Under what circumstances a creditor can perfect within such period an inchoate right previously acquired has been the source of much conflict under early bankruptcy legislation. It was comparatively simple to require that the property should not be obtained by an

⁷ *The Feronia*, L. R. 2 A. & E. 65.

⁸ *Central, etc., Co. v. East Tennessee, etc.*, R. R., 80 Fed. Rep. 624.

⁹ *Wood v. N. Y., etc.*, R. Co., 70 Fed. Rep. 741.

¹⁰ *Rutherford v. Penn., etc.*, R. R. Co., 178 Pa. St. 38. See *Fosdick v. Schall*, 99 U. S. 235.

¹¹ *Brandenstein v. Way*, 17 Wash. 293.

¹² See *Hale v. Frost*, 99 U. S. 389.

¹³ *Merchants' Bank v. Moore*, 106 Ala. 646 (limited to quasi-public corporations). See *Bound v. South Carolina Ry. Co.*, 47 Fed. Rep. 30 (applied only when mortgagees ask for a receiver).

act done immediately before the insolvency proceedings commenced, but it was difficult to discover from the cases exactly how much "perfecting" the courts would allow within the prohibited period. Thus a creditor who, just before the bankruptcy of his debtor, had exchanged an invalid bill of sale for a good legal mortgage was regarded as having secured a preference,¹ whereas a mortgagee who by taking possession within the proscribed period made valid an inoperative mortgage on future acquired property was held not to have been unduly preferred.² The difficulty of reconciling such cases doubtless influenced many courts to take advantage of the recent Bankruptcy Act to throw off the burden of hair-splitting distinctions. This is shown by a late decision of the Massachusetts Supreme Court,³ holding that the once leading cases of *Chase v. Denny*⁴ and *Sawyer v. Turpin*⁵ are no longer controlling under the present Act, and that where a mortgagee must take possession in order to perfect his lien and fails to do so until within four months of the filing of the petitions he must be taken to have received a preference. In other courts also the clear and workable rule has been gradually taking form that a transfer should be regarded as having taken place at the time when it first became effective against creditors.⁶ That this is a fair construction of the Act seems clear from the amendment to section 60 a, which provides that "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required."⁷

In view of these facts it is to be regretted that a recent decision by the Supreme Court of the United States has thrown the law upon this subject back into its former confusion. By the law in Vermont the mortgagee of chattels to be acquired by the mortgagor in the future course of his business can obtain a lien valid against creditors only by taking possession of the property.⁸ The defendant being for nine years the holder of such a mortgage had taken possession only within four months of the filing of the petition against the mortgagor. The court held that the mortgagee's right, although perfected within the proscribed period, related back to the time when the mortgage was given and did not constitute a voidable preference. *Thompson v. Fairbanks*, 196 U. S. 516. Since the purpose of forbidding preferences is evidently to prevent one creditor from obtaining a greater percentage of his debt than any other creditor of the same class, the institution of bankruptcy proceedings should be a boon to an unsecured creditor, but under the present decision they may operate as a positive detriment. When, as actually happened in the present case, he attaches the property before the mortgagee takes possession, he acquires, if no proceedings follow, a lien prior to that of the mortgagee. But if proceedings are instituted their effect must be not only to dissolve his lien,⁹ but also to deprive him of his percentage on the property by perfecting the subsequent claim of the mortgagee.

¹ *Barnes v. Copeland*, 147 Mass. 388.

² *Chase v. Denny*, 130 Mass. 566.

³ *Tatman v. Humphrey*, 184 Mass. 361. (This decision was reversed in *Humphrey v. Tatman*, decided by U. S. Sup. Ct., April 17, 1905.)

⁴ *Supra*.

⁵ 91 U. S. 114.

⁶ *In re Klingaman*, 4 Am. B. Rep. 254; *Matthews v. Hardt*, 9 Am. B. Rep. 373; *In re Ball*, 123 Fed. Rep. 164. *Contra*, *Sabin v. Camp*, 98 Fed. Rep. 974.

⁷ *Crooks v. People's Bank*, 3 Am. B. Rep. 238.

⁸ *Peabody v. Landon*, 61 Vt. 318.

⁹ See Bankruptcy Act of 1898, § 67 c.

RESTRICTIVE COVENANTS AFTER THE DISSEISIN OF THE COVENANTOR. — When a disseisor enters on land bound by a negative restrictive covenant, may the covenantee force him to observe the restriction? Since the covenant is enforceable against assignees of the covenantor only in equity, and does not attach inseparably to the land like a legal easement or rent charge, and since there is no privity between the covenantor and disseisor, it has been argued that the disseisor cannot be held to his disseisee's obligation. This theory would leave the covenantee without remedy if the disseisor should do the acts forbidden by the covenant; for the courts would hardly adopt the expedient of allowing the covenantee to compel re-entry, by an unwilling disseisee, who has never legally bound himself to do any such thing. There seems to be no adequate reason why the disseisor should not, on the simple ground of justice to the covenantee, be enjoined to respect the covenant, — he cannot complain if an estate coming to him as the gratuity of another's negligence is restricted in its use. Such a course would be no anomaly. Though a covenantor has agreed for himself alone, yet on the ground of necessity in working out justice to the covenantees where unjust enrichment would otherwise result, a donee or purchaser with notice from the covenantor is held to take subject to the covenant.¹

The same principle appears in the analogous case of a trust, where it is the privilege of the *cestui* to protect the trust estate if the trustee is incapacitated.² There are many examples of this. The *cestui* of a mortgage held in trust is allowed to bring a bill to foreclose when the trustee is out of the country,³ a result which the court bases on the ground of "substantial necessity." So also, where a sheriff wrongfully disseised the trustee of certain lands, and the trustee resigned, the *cestui* has been allowed to bring a bill to restrain an execution sale of the land.⁴

That the right of the injured party to sue may exist though the person who should have protected him has no action, is shown by the case of the donee or purchaser with notice from a covenantor, where the covenantor himself has no right of action. As the statute cannot run against an unbroken negative covenant, it would seem, further, that, as a recent English case holds, the disseisor's obligation to respect the covenantee's right should not terminate when the disseisee's rights are barred by the statute. *Re Nesbitt and Potts' Contract*, 53 W. R. 297 (Ch. D.).

SUSPENSION OF EASEMENTS BECAUSE OF MISUSER. — The law affords immediate redress for an excessive user of an easement, because such user may be at once an injury to the servient tenement and the basis of a new prescriptive right. The owner of the servient tenement may protect himself, in the case of affirmative easements, by bringing trespass for the excess,¹ by physically obstructing the encroachment,² or, where the legal

¹ Cf. *De Mattos v. Gibson*, 4 De G. & J. 276.

² *Beach, Trusts & Trustees* § 698.

³ *Ettlinger v. Persian, etc., Co.*, 142 N. Y. 189.

⁴ *Zimmerman v. Makepeace*, 152 Ind. 199.

¹ *Davenport v. Lamson*, 21 Pick. (Mass.) 72.

² *French v. Marstin*, 32 N. H. 316.

remedy is inadequate, by obtaining an injunction.³ But there are cases where the authorized and unauthorized user are so intertwined that the obstruction of one is impossible without interference with the other. Moreover in such cases a court would find it difficult, if not impossible, to award damages in trespass, or to determine, for the purpose of enforcing an injunction against the wrongful user only, when the right had been exceeded. The only remedy is to stop all user. Since it seems hardly advisable to allow total obstruction of the way without the court's authority, resort must be had to some form of injunction. This necessity arose in a recent case in the New York Appellate Division. *McCullough v. Broad Exchange Co.*, 92 N. Y. Supp. 533. The owner of land to which a general right of way was appurtenant had erected an office building partly upon the dominant tenement and partly upon premises adjoining. Tenants and employees from the entire building could and did use the way. Over it, also, coal was brought for the boilers situated on the dominant estate but heating all parts of the building. The contention in this case that there should be a permanent injunction was properly refused. An easement is a valuable property right, and as such merits protection. It may be acquired, as may other interests in realty, by grant or prescription. It may be lost, also, by these and certain other well-defined means.⁴ Some text-writers have intimated that one means of extinguishment, where the rightful and wrongful user are inseparable, is forfeiture by abuse.⁵ This conclusion they appear to derive mainly from the early English cases dealing with the easement of light. Naturally no suit at law or in equity lay for an increased number of windows in a tenement possessed of ancient lights. If the servient owner could obstruct the new lights only, he might do so. Where that was not possible he might formerly obstruct all if necessary, at least until the lights were restored to their ancient condition.⁶ These early cases, however, are of little value as precedents, for the modern law, far from extinguishing the easement, permits no obstruction whatever of the ancient lights, even though encroachment cannot otherwise be prevented.⁷ The only reason for compelling forfeiture as the result of excessive user can be the protection of the servient owner. Where the rightful user is separable he already has sufficient protection, and the courts have so held.⁸ In the principal case, also, where the user was inseparable, the injunction given forbade only the dominant owner's using the easement or furnishing occasion or extending invitation to others to use it, until the building should be so altered as to permit the proper user only. This conditional form of injunction seems an entirely adequate remedy here and in all such cases, so that it is difficult to imagine any in which actual forfeiture of the easement should be required.⁹

³ *Louisville, etc., Ry. Co. v. Malott*, 135 Ind. 113. See *Greene v. Canny*, 137 Mass. 64.

⁴ See *Jones, Easements* § 834 *et seq.*

⁵ *Washburn, Easements*, 4th ed., 704; *Reeves, Real Property* § 195; *Gale, Easements* 506.

⁶ *Renshaw v. Bean*, 18 Q. B. 112; *Hutchinson v. Copestake*, 8 C. B. (N. S.) 101. See *Garritt v. Sharp*, 3 Ad. & E. 325.

⁷ *Tapling v. Jones*, 13 C. B. (N. S.) 876; *Aynsley v. Glover*, L. R. 10 Ch. 283.

⁸ *Mendell v. Delano*, 7 Met. (Mass.) 176; *Walker v. Gerhard*, 9 Phila. (Pa.) 116. See *White's Bank v. Nichols*, 64 N. Y. 65; *Proprietors, etc., v. Nashua, etc.*, R. R. Co., 104 Mass. 1.

⁹ See *Masonic Temple Ass'n v. Harris*, 79 Me. 250.

THE RIGHT TO REMOVE TRADE FIXTURES ANNEXED BY ONE NOT THE OWNER OF THE FEE. — It has been recently decided in Massachusetts that the rails of a street railway company are personalty and go to a conditional vendor rather than to a subsequent mortgagee of the company's property.¹ *Lorain Steel Co. v. Norfolk, etc., St. Ry. Co.*, 73 N. E. Rep. 646 (Mass.). The case was distinguished from that of a steam railroad, the rails of which are held realty, upon the ground that a street railway company has no easement or other interest in the land.² This decision illustrates the general tendency of the courts to confuse two distinct questions; viz., whether the chattels have become fixtures, and whether they are removable. Whether they have become a part of the realty depends upon the objective intention of the party affixing, to be ascertained by examining the intimacy of their connection with the soil, the amount of damage to them or to the land which would be caused by removal, and their adaptability to the use to which the premises are devoted. The actual intention of the person annexing and his relation to the land bear only upon the question of removability.³ Where such party has no permanent interest in the land, the right of removal would seem to rest upon an implied agreement with the landowner; for while a lessee or licensee may sever,⁴ a trespasser has no such privilege.⁵ Moreover this right of severance, implied from the license to occupy the land, seems incident to, and inseparable from, such right of occupation; for it must be exercised by the lessee before the end of his term,⁶ and it passes to an assignee or mortgagee of the leasehold.⁷

As between a conditional vendor and a tenant, articles annexed under the agreement of sale should go to the former, not because the agreement has prevented their becoming fixtures, but because the tenant is under a contractual obligation to allow his right of removal to be exercised by the vendor. The contract is, in effect, to give security, and should therefore be specifically enforceable in equity.⁸ But when the tenant assigns or mortgages his right to occupy the land, the right to sever passes to his assignee and the vendor's right is cut off at law. A court of equity, however, should enforce it against a transferee of the tenant who has notice or has not parted with value in reliance upon the presence of the fixture on the land. Thus subsequent transferees with notice and prior encumbrancers should be postponed to the conditional vendor.⁹

WRONGFUL SALE OR RE-PLEDGE BY A PLEDGEE. — Whether a pledgee who wrongfully sells or re-pledges his security, in excess of his authority, is

¹ *Hart v. Benton-Bellefontaine Ry. Co.*, 7 Mo. App. 446, *contra*. See *Readfield, etc., Co. v. Cyr*, 95 Me. 287; *American Union Telegraph Co. v. Middleton*, 80 N. Y. 408.

² *Hunt v. Bay State Iron Co.*, 97 Mass. 279.

³ In the majority of jurisdictions chattels annexed by a tenant for purposes of trade are considered parts of the realty, though removable by the tenant. Cf. *Gibson v. Hammersmith Ry. Co.*, 32 L. J. Ch. 337; *Bliss v. Whitney*, 9 Allen (Mass.) 114.

⁴ *Gibson v. Hammersmith Ry. Co.*, *supra*; *Bliss v. Whitney*, *supra*. See *Barnes v. Barnes*, 6 Vt. 388, 394.

⁵ *Van Size v. Long Island R. R. Co.*, 3 Hun (N. Y.) 613.

⁶ Cf. *Watriss v. First National Bank of Cambridge*, 124 Mass. 571.

⁷ *Ex parte Astbury*, L. R. 4 Ch. 630.

⁸ See *Hermann v. Hodges*, L. R. 16 Eq. 18.

⁹ Cf. *Davenport v. Shants*, 43 Vt. 546; *Brennan v. Whitaker*, 15 Oh. St. 446. *Contra*, *Ford v. Cobb*, 20 N. Y. 344; *Clary v. Owen*, 15 Gray (Mass.) 522.

liable to his pledgor in trover without a tender of the debt, is a question on which the authorities are in conflict. The first adjudication of the point in England held him liable, but limited the plaintiff's recovery to the amount of his actual loss.¹ The case was, however, virtually overruled by two later decisions,² and the law is now settled in England that the pledgor's right to possession of the pledge is always conditioned on tender of the debt. A recent Canadian case has approved the English view. *Ames v. Sutherland*, 5 Ont. W. Rep. 328. In this country the courts are still in conflict.³ The English rule is difficult to defend. It is well settled that a mere lien-holder, as a bailee for hire, is immediately liable in trover for wrongfully parting with the bailed property.⁴ By parting with it he loses his lien, and the bailor thus acquires an immediate right of possession. The only reason assigned for a different holding in the case of a pledgee is that his rights are larger than those of a lien-holder: on compliance with certain conditions he has a right to sell or re-pledge; therefore, it is argued, an improper sale or re-pledge does not altogether divest him of his right of possession as against the pledgor. The question of the amplitude of his powers seems, however, quite beside the mark; whatever they may be, if he exceeds them, he should be held as strictly to account as a bailee for hire.

If, however, he is liable in trover, must he pay full damages? The English case which holds that he need not, apparently places his right to reduce the damages on principles of recoupment;⁵ and some American cases have expressly put it on this ground.⁶ This view, however, seems questionable. The common law right to reduce damages in recoupment exists only where the defendant has suffered loss by the plaintiff's breach of an obligation arising from the same contract,⁶ and the right would thus seem hardly broad enough to include the case under discussion.⁷ Moreover, even if recoupment is allowed, it will obviously not afford the pledgee an adequate remedy where the pledge at the time of the conversion is worth less than the debt,⁸ — as, for instance, where stock has been bought on margin and the margin has been wiped out. In such a case the defendant, for complete protection, would have to rely on the statutory remedies of set-off or counterclaim, which, however, in many jurisdictions in this country would probably be found liberal enough for the purpose.⁹ But even if neither recoupment nor a statutory remedy is available, the result could hardly be considered unjust, since it is by his own breach of contract that the pledgee has been deprived of his security.

FORFEITURE OF INSTALMENTS BY CONDITIONAL VENDEE UPON DEFAULT. — There is considerable conflict of opinion upon the question of the conditional vendee's right to instalments already paid, when he makes default

¹ *Johnson v. Stear*, 15 C. B. (N. S.) 329.

² *Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Exch. 299.

³ In accord with the English rule, *Talty v. Freedman's Savings Bank*, 93 U. S. 321. *Contra*, *Neiler & Warren v. Kelley*, 69 Pa. St. 403; *Feige v. Bert*, 118 Mich. 243.

⁴ *Pollock, Torts*, 6th ed., 350.

⁵ *Neiler & Warren v. Kelley*, *supra*.

⁶ *Waterman, Set-off, Recoupment and Counterclaim* § 422.

⁷ See *Smith v. Hall*, 67 N. Y. 48.

⁸ See *Batterman v. Paine*, 3 Hill (N. Y.) 171.

⁹ See *Richardson v. Ashby*, 132 Mo. 238.

and the seller retakes the chattel. Text-writers favor forfeiture;¹ but eliminating those cases where forfeiture on default was expressly provided for, and those in which the court allows the vendor to retake the chattel but expressly refuses to discuss the right of the vendee to recover his previous payments in another action, it appears that the authority in support of this view is slight. A *dictum*, forming an alternate ground for a decision by the supreme court of Illinois, directly denies the vendee's right to the instalments,² but a much later case, in a lower court of the same state, takes a different view.³ Massachusetts and Vermont allow the full value of the chattel to be recovered from the vendee when he converts it, and refuse to let him plead the prior payments in mitigation of damages.⁴ Maine grants the same stern remedy against the sub-vendee.⁵ These, however, are cases of conversion, not of default, and may possibly be distinguished, though indicating the court's temper. On the other hand, the weight of authority seems to favor the view recently taken by the supreme court of Utah, which has just sustained a refusal to instruct that the paid instalments were forfeited. *Shafer v. Russell*, 79 Pac. Rep. 559. In Georgia,⁶ there is a square holding, followed by *dicta* to the same effect,⁷ that an action cannot be brought against the defaulting vendee for the chattel, without tender of the instalments previously paid. The Michigan supreme court has gone so far as to announce its opinion that even an express agreement to forfeit will not be enforced.⁸ North Carolina and Mississippi hold that where the vendor retakes and sells the chattel he must apply the paid instalments on the debt and turn over the surplus from the resale to the original vendee.⁹ New York now reaches the same result by statute, as to a large class of chattels.

In short, the tendency seems to be against forfeiture and toward the application of mortgage principles. The courts consistently refuse to construe such contracts as leases, though so worded.¹⁰ They refuse to allow the buyer to exempt himself from liability for the purchase price by returning the chattel and tendering damages for his breach,¹¹ — a position difficult to explain save on the ground that the retention of title is in effect a mortgage. By the same analogy, though title has not passed, when the chattel is destroyed the loss is fixed on the vendee and he is made to pay his instalments after the *quid pro quo* has disappeared.¹² Here again the reserved title in the vendor is treated merely as security whose fluctuation in value cannot affect the obligation. If this transaction is not in effect a mortgage, the great mass of decisions based on this analogy is wrong; if it is in effect a mortgage, then the analogy should apply in favor of the buyer as well as the seller, and it is against the equitable spirit of modern law to apply the doctrine of strict foreclosure.

¹ Benjamin, Sales, 6th Am. ed., 284; 6 Am. & Eng. Enc. 458, n. 6.

² Latham v. Sumner, 89 Ill. 233.

³ Singer, etc., Co. v. Ellington, 103 Ill. App. 517.

⁴ Angier v. Taunton, etc., Co., 1 Gray (Mass.) 621; Morgan v. Robinson, 55 Vt. 367.

⁵ Hawkins v. Hersey, 86 Me. 394.

⁶ Hays v. Jordan, 85 Ga. 741.

⁷ Snook v. Raglan, 89 Ga. 251.

⁸ Johnston v. Whittemore, 27 Mich. 463, 470.

⁹ Puffer v. Lucas, 112 N. C. 377; Dederick v. Wolfe, 68 Miss. 500.

¹⁰ Contracting, etc., Co. v. Continental Trust Co., 108 Fed. Rep. 1.

¹¹ Smith v. Aldrich, 180 Mass. 367.

¹² Tufts v. Wynne & Thompson, 45 Mo. App. 42.

COMPETENCY OF ONE SPOUSE TO TESTIFY AGAINST THE OTHER. — The rule that a wife may not testify against a husband or a husband against a wife in any action to which the other is a party or in the outcome of which he is interested is too well settled to be disputed.¹ How far, however, in actions between third parties, one spouse may testify to matters that tend to criminate the other is still a vexed question. Yet the reason for the exclusion of the testimony is the same in both cases — a reason of supposed public policy, the danger, namely, of creating marital dissension. Admitting that the reason is sound, the question arises as to the scope of its application. Interest, the reason for that other rule which forbids one spouse to testify for the other, obviously goes to the competency of the evidence. But does the necessity for preserving marital peace point beyond a rule of privilege? It seems plain enough that no public policy imposes any such quixotic obligation on the courts as that of restoring a domestic harmony which the willingness of the witness to testify reveals as probably irretrievably shattered. Nevertheless, from Lord Coke's time down, the courts have treated testimony against a spouse as inadmissible;² and, where exceptions are sanctioned, it seems generally to be taken for granted (often *dicta* expressly state it³) that the witness could not have been compelled.

But does public policy require even that an unwilling witness should always be privileged? It certainly seems open to serious question whether, in the majority of cases, even compelled testimony would produce the dire results contemplated. The courts, nevertheless, almost universally content themselves with purely perfunctory reasoning; and, however grave the issue, rarely stop to consider the other side of the question, — the possible consequences of a suppression of the truth. The mercy of the rule has been pushed to merciless extremes. Thus, in a South Carolina case, a conviction for murder was ruthlessly affirmed, although, on the trial, the wife of one who had been jointly indicted with the defendant but was not to be tried, was not permitted to testify that her husband alone was the murderer.⁴ Perhaps the best solution would be to leave the question to the discretion of the trial court.

Most frequently, perhaps, the question arises in criminal trials for adultery. It is, of course, well settled that where both offenders are tried together, the wife or husband of either is incompetent.¹ Where, however, the paramour alone is on trial, there is a sharp conflict.⁵ The cases have been collected and discussed in a recent article. *Wife Testifying against Husband's Paramour in Adultery Cases*, by Edward W. Faith, 60 Cent. L. J. 164. In these cases, as elsewhere, the courts discuss the question as one of competency alone, though it must be evident that whatever force the con-

¹ See 1 Greenleaf, Ev., 16th ed., § 334 *et seq.*

² See 3 Wigmore, Ev. § 2227.

³ See *King v. All Saints*, 6 M. & S. § 194; *Woods v. State*, 76 Ala. 35; in *Brock v. State*, 44 Tex. Cr. App. 335, and in *Barber v. People*, 203 Ill. 543, the court went so far as to hold that the privilege could not be waived even by the husband against whom the testimony was offered.

⁴ *State v. Bradley*, 9 Rich. (S. C.) 168. It does not even appear that the witness was unwilling. In *Ware v. State*, 35 N. J. Law 553, the conviction was reversed for a similar ruling at the trial.

⁵ Excluding the testimony: *State v. Welch*, 26 Me. 30; *State v. Gardner*, 1 Root (Conn.) 485; *Com. v. Sparks*, 89 Mass. 534; *State v. Wilson and Wagner*, 31 N. J. Law 77. Admitting the testimony: *State v. Marvin*, 35 N. H. 22; *State v. Bridgman*, 49 Vt. 202 (*semble*, that the witness would not have been allowed to testify to the act itself); *State v. West*, 118 Wis. 469; *Campbell v. State*, 133 Ala. 158.

ventional argument of public policy has in other situations, in the case of a witness willing to testify to the infidelity of a spouse it becomes almost grotesque.⁶ But if the witness is unwilling, there would seem to be in this instance a valid reason for excusing him. No rights of third parties are involved, and the right of the state to secure a conviction should be subordinated to the desire of the witness, for his own sake or the sake of his children, to condone the offense. Though the point appears never to have arisen, it is highly improbable that the testimony would ever be compelled.⁷

CONVEYANCE OF LAND UPON AN ORAL TRUST. — When land is conveyed upon an oral trust, the grantee, who refuses to perform his promise under the protection of the Statute of Frauds, is by the English courts made a constructive trustee for the grantor.¹ In the United States, however, he may repudiate his unenforceable obligation and keep the land upon payment to the grantor of its fair market value.² But if the conveyance was induced by fraud a constructive trust arises. And on account of the harshness of the general American doctrine, a ready disposition to find fraud from the circumstances of the case or the relation of the parties is manifested. Thus, even though the conveyance was not actively induced, a present intention not to execute the trust constitutes sufficient fraud to vitiate the transaction, and the subsequent repudiation is evidence of a fraudulent purpose at the outset.³ Similarly, where a confidential relation exists between the parties, the transaction is presumed to be fraudulent.⁴ Just what constitutes confidential relations is somewhat in dispute. There is, for example, a square conflict whether a conveyance to a wife upon an oral trust is ground for equitable intervention.⁵ The tendency of the courts, however, is illustrated by a recent Nebraska decision. The plaintiff, who owned a half-interest in land, conveyed his share to his co-owner upon an oral agreement by the latter to reconvey. He was allowed to recover his interest on account of the fiduciary relation between the parties. *Koefoed v. Thompson*, 102 N. W. Rep. 268.

The basis of the American rule seems to be the conception that to raise a constructive trust, as the English courts do, would be to go directly in the teeth of the Statute of Frauds. Of course, where the transaction is tainted with actual fraud, the statute does not apply and restitution is the ordinary equitable remedy. To imply fraud, however, from the relation of the parties is simply to use a fiction to avoid the application of an unpalatable doctrine. The injustice of allowing the grantee unduly to enrich himself, is recognized by charging him with the value of the land. This is a direct admission that he has received something which he is not entitled to keep, and it is, therefore, difficult to see why restitution is not the proper remedy.⁶

⁶ See *State v. Briggs*, 9 R. I. 361.

⁷ The question could not, of course, arise in states where the indictment can be brought only on the complaint of the husband or wife.

¹ *Davies v. Ottley*, 35 Beav. 208; *In re Duke of Marlborough*, [1894] 2 Ch. 133.

² *Burt v. Wilson*, 28 Cal. 632.

³ *Cf. Brown v. Doane*, 86 Ga. 32.

⁴ *Wood v. Rabe*, 96 N. Y. 414.

⁵ See *Brison v. Brison*, 75 Cal. 525. *Contra*, *Brock v. Brock*, 90 Ala. 86.

⁶ See *Dickerson v. Mayo*, 60 Miss. 388.

In the analogous cases, where a deed absolute on its face is in fact given by way of mortgage, the American courts enforce the parol agreement.⁷ The Wisconsin court, in a leading decision, frankly admits that these cases are indistinguishable, but regards them as an encroachment upon the Statute of Frauds, and refuses to extend the exception.⁸ To consider the creation of a constructive trust in cases of this class as a judicial contravention of an express statute seems to be a misconception. The oral trust is given no more weight under these circumstances than in the case of fraud. The grantee may repudiate his express promise with impunity, but in so doing he should not be allowed to enrich himself unjustly at the grantor's expense. Equity therefore fastens upon him a new obligation to return what it is unconscionable for him to keep. This new obligation is a constructive trust, expressly excepted from the operation of the Statute of Frauds. It is raised upon the same principle that creates a resulting trust where property is given upon an express trust which proves to be void. When the oral trust is for the benefit of a third party, a constructive trust for the grantor can hardly be said to contravene the Statute; when the oral trust is for the benefit of the grantor himself, the mere fact that relief by restitution achieves a result identical with that of enforcing the oral trust should be immaterial.⁹ The right ought not to be confused with the remedy.

TRANSFER OF ACCOMMODATION PAPER AFTER MATURITY. — Although it is well settled that the transferee of a bill or note after maturity takes it subject to all equitable defenses existing against his transferor at the date of transfer, there is a sharp conflict as to the rights of the holder of accommodation paper which has not been negotiated until after maturity. By the prevailing American doctrine he is denied relief against the accommodating party;¹ but the English courts allow him to recover.² The English law is followed in Maine and Illinois, and has been recently approved in Connecticut.³ *Mersick v. Alderman*, 60 Atl. Rep. 109. The reason sometimes given in support of the American decisions, namely, lack of consideration,⁴ is obviously unsound, for it would be equally applicable to cases where the transfer is made before maturity to one who had notice of the nature of the instrument, and would virtually contravene the very purpose of accommodation papers. The extent of the liability of the person who has signed for accommodation should depend upon the reasonable understanding of the parties to the transaction. This is recognized by the English courts, for the

⁷ *Campbell v. Dearborn*, 109 Mass. 130. The Kentucky court is consistent and has not followed these decisions. *Manford v. Green's Adm'r*, 44 S. W. Rep. 419.

⁸ *Rasdall v. Rasdall*, 9 Wis. 379, 391.

⁹ See *Ryan v. Dox*, 34 N. Y. 306, 319.

¹ *Kellog v. Barton*, 12 Allen (Mass.) 527; *Chester v. Dorr*, 41 N. Y. 279; *Peale v. Addicks*, 174 Pa. St. 549; *Cottrell v. Watkins*, 89 Va. 801.

² *Charles v. Marsden*, 1 Taunt. 224; *Carruthers v. West*, 11 Q. B. 143.

³ *Dunn v. Weston*, 71 Me. 270; *Miller v. Larned*, 103 Ill. 562, 570. Of the American cases cited by the court only the above are square decisions. *Harrington v. Dorr*, 33 Rob. (N. Y.) 275, cited by the court, was reversed on appeal. *Chester v. Dorr*, *supra*. *Davis v. Miller*, 14 Gratt. (Va.) 1, was overruled by *Cottrell v. Watkins*, *supra*.

⁴ See *Peale v. Addicks*, *supra*.

accommodation maker may protect himself by taking an express agreement from the payee that the instrument shall not be transferred after maturity.⁵

The basis of the conflict, therefore, is a difference as to the implication to be drawn from the fact of signing the accommodation. The English courts find a contract of continuing guaranty of the payment of the note, irrespective of its terms as to time of payment. The American courts presume that the accommodating party intends to lend his credit only until the maturity of the paper. This latter view seems to accord with the mercantile understanding. The transaction contemplates payment of the instrument at maturity by the accommodated party, and a transfer thereafter is certainly at variance with this idea.⁶ This is clearly revealed in the case of an accommodation endorser, who by the very fact of his endorsement is held to contract not to be bound unless the instrument is duly presented at maturity and due notice of dishonor is given. Here there can be no liability upon negotiation after maturity, since performance of these conditions precedent is impossible. In all cases, the agreement, express or implied, not to negotiate after maturity, raises an equity of which a purchaser after the instrument is due is deemed to have notice.

A distinction should, however, be made where the transfer is taken before maturity for collateral security, and further advances are made after maturity. The mercantile notion that a transferee after maturity is bound to make inquiries as to equitable defenses should not be extended to such a case, any more than the doctrine requiring a mortgagee to search the records extends to the case where he makes further advances after subsequent mortgagees have intervened.⁷ When once a valid title has been acquired, whether after inquiry or without the necessity for inquiry, it should be protected. Thus, where a note was obtained by fraud and transferred as collateral before maturity, the transferee was protected as to subsequent loans after maturity.⁸ Although the principal case, in which the holder of a note given as collateral security was protected as to advances made both before and after maturity, is placed squarely upon the English doctrine, it may well be supported upon this latter ground.

⁵ *Parr v. Jewell*, 16 C. B. 684; see *Charles v. Marsden*, *supra*.

⁶ *Chester v. Dorr*, *supra*.

⁷ See *Ames, Cas. Trusts*, 2d ed., 339, n. 1.

⁸ *Bancroft v. McKnight*, 11 Rich. (S. C.) 663; *Spring's Appeal*, 10 Barr (Pa.) 235.

RECENT CASES.

ACCORD AND SATISFACTION — VALIDITY — RETENTION OF SUM SENT AS FULL PAYMENT OF AN UNLIQUIDATED CLAIM. — The validity of a contract to pay an increased price for milk being in question, the seller notified the buyer that he would hold him to the contract, and that any payments made would only be credited on account. The buyer continued to receive the goods and sent in payment checks for smaller sums accompanied by statements at the foot of which were the words "to check in full." The seller accepted these checks and sued for the balance of his claim. *Held*, that the facts do not show an accord and satisfaction. *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367.

In New York and in most states the retention, although under protest, of a sum sent as full satisfaction of an unliquidated claim operates as an accord and satisfaction. *Fuller v. Kemp*, 138 N. Y. 231. That rule, resting as it must upon an implied acceptance of the offer of compromise, has been adversely criticised in some quarters. 17 HARV. L. REV. 272; *ibid.* 469. The appropriation of a remittance, when accompanied by an express rejection of any conditions annexed, seems a conversion rather than an acceptance of the conditions. The principal case breaks away from the harsh New York rule to the extent of holding that such retention cannot be interpreted as an acceptance of the condition when, prior to its making, the buyer is informed that the seller intends to insist upon a definite claim, and that nothing is to constitute a waiver of his rights. See *Eames, etc., Co. v. Prosser*, 157 N. Y. 289. The distinction from *Fuller v. Kemp* is slight, but the case shows a tendency in a desirable direction. How far the seller must commit himself in order that an assent may not be implied against him is likely to prove a troublesome question.

AGENCY — NATURE AND INCIDENTS — WHEN KNOWLEDGE OF AGENT IS IMPUTABLE TO PRINCIPAL. — An agent, colluding with a vendor in fraudulent representations to his principal, induced the latter to purchase certain land. For his assistance the vendor secretly paid him a commission which the principal recovered at law. Subsequently the principal sued the vendor for fraud and deceit with reference to the sale. *Held*, that the prior action against the agent does not so ratify the contract in all particulars as to bar the action against the vendor for deceit. *Barnsdall v. O'Day*, 134 Fed. Rep. 828 (C. C. A., Third Circ.).

Where an agent has acted in fraud of his principal the latter is not ordinarily chargeable with such knowledge as the agent possessed, and may sue a third party for fraudulent representations although the agent was aware of their falsity. See *Benedict v. Arnoux*, 154 N. Y. 715, 728. It was contended by the defendant in the present case that a different result should be reached, because, by suing for the wrongfully obtained bonus, the principal ratified the transaction and restored the agent to his position as agent for all purposes of the purchase. Such a result seems undesirable and unnecessary. Even if no fraudulent representations had been made to the principal he might recover any bonus secretly received by his agent from other parties to the contract. *Warren v. Burt*, 53 Fed. Rep. 101. That recovery cannot by retroaction restore the trustworthy character of the agent, nor can it condone the perpetration of a separate and distinct wrong. Hence he and the other defrauding party as well should still be liable for the further damage resulting from fraudulent representations. See *Keator v. St. John*, 42 Fed. Rep. 585; *Glaspie v. Keator*, 56 Fed. Rep. 203.

BANKRUPTCY — PREFERENCES — PERFECTING INCHOATE RIGHT TO SECURITY. — The defendant, who had for nine years held a chattel mortgage on goods to be acquired by the bankrupt in the future course of his business, took possession only within four months of the commencement of bankruptcy proceedings. By the law of the state such a mortgage was not valid against creditors until possession was taken. *Held*, that the defendant's title relates back to the time when the mortgage was given, and that he has received no preference. *Thompson v. Fairbanks*, 196 U. S. 516. See NOTES, p. 606.

BILLS AND NOTES — DEFENSES — LACK OF DUE PRESENTMENT. — The defendant was sued as an indorser of a demand note. Sec. 131 of the Negotiable Instruments Law in New York required that a note payable on demand be presented for payment within a reasonable time. *Held*, that failure to present within a reasonable time is a

defense analogous to the statute of limitations and must be pleaded affirmatively. *German-American Bank v. Mills*, 99 N. Y. App. Div. 312.

It is well settled that the liability of an indorser is conditional. In order to charge him on his indorsement, there must have been due presentment of the instrument to the maker and due notice of dishonor to the indorser; and it is part of the plaintiff's case to show the fulfilment of these conditions. *Cf. Callahan v. Bank of Kentucky*, 82 Ky. 231. The question then arises as to what is due presentment of an instrument payable on demand. Sec. 131 of the New York Negotiable Instruments Law merely answers that question. It requires presentment within a reasonable time, but by such requirement would not appear to have made it any less a condition precedent to an indorser's liability. On principle, therefore, the decision seems questionable, and no authority has been found to support it. Indeed, a late Massachusetts case in applying the same section assumed the correctness of the contrary position. *Merritt v. Jackson*, 181 Mass. 69; *cf. Martin v. Winslow*, 2 Mas. (U. S.) 241.

BILLS AND NOTES — DEFENSES — TRANSFER OF ACCOMMODATION NOTE AFTER MATURITY. — An accommodation note was transferred by the payee before it matured, as collateral security, and additional advances were made after maturity. *Held*, that the holder is protected as to all advances. *Mersick v. Alderman*, 60 Atl. Rep. 109 (Conn.). See NOTES, p. 615.

CHOSSES IN ACTION — WHAT MAY BE ASSIGNED — ASSIGNMENT OF PROCEEDS OF FUTURE SALES. — To secure advances of merchandise from a certain company, the defendant gave it a written order directing a person to whom he sold milk to pay the proceeds of future sales to the company. There was no contract requiring further delivery or acceptance of milk. *Held*, that the order does not operate as an assignment either at law or in equity. *O'Neil v. Helmke*, 102 N. W. Rep. 573 (Wis.).

In most jurisdictions a mortgage of goods to be afterwards acquired is enforceable in equity. *Holroyd v. Marshall*, 10 H. L. Cas. 191. There would seem to be no reason for distinguishing between choses in possession and choses in action. Accordingly, it has been held, contrary to the decision in the present case, that the proceeds of possible future sales are assignable in equity. *East Lewisburg, etc., Co. v. Marsh*, 91 Pa. St. 96; *Field v. Mayor of New York*, 6 N. Y. 179. The cases which hold that there can be no valid assignment of wages to be earned under a possible future engagement must be recognized as resting upon grounds peculiar to themselves. *Cf. Herbert v. Bronson*, 125 Mass. 475. This exceptional doctrine has been established to prevent workmen from mortgaging their future wages for long and indefinite periods, which would often lead to improvidence and poverty. But even in these cases, if there is an existing employment, though the contract of service is terminable at any time by either party, the assignment is supported. *Lannan v. Smith*, 7 Gray (Mass.) 150.

CONSTITUTIONAL LAW — CLASS LEGISLATION — DISCRIMINATING REGULATION OF STREET RAILWAY RATES. — A statute required street railway companies to carry pupils between their homes and the public schools at rates not exceeding half the regular fare between the same points. *Held*, that the statute does not infringe the Fourteenth Amendment. *Commonwealth v. Interstate, etc., Ry. Co.*, 73 N. E. Rep. 530 (Mass.).

A statute prescribing the maximum charge of a public service company will be held constitutional, in the absence of evidence clearly showing that such regulation will prevent the company from earning a reasonable profit on the item of business affected. *Chicago, etc., Co. v. City of Chicago*, 199 Ill. 484, 547; 199 *ibid.* 579, 642. A more novel point in the present decision is the validity of the discrimination between pupils of public schools and other persons. Legislation conferring special privileges on a class of persons is constitutional if public welfare creates a reasonable need for a different treatment of the individuals selected, and all persons within the class are affected alike under like circumstances. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89; *Magoun v. Illinois, etc., Bank*, 170 U. S. 283. Statutes exempting private educational institutions from taxation have been upheld. *City of Indianapolis v. Sturdevant*, 24 Ind. 391. Laws prescribing that text-books be supplied free to pupils, or even that clothing be furnished to poor students, have also been frequently enacted, and their constitutionality seems never to have been questioned. The duty of a state to provide a system of public education therefore seems a sufficient justification for the discrimination made by the Massachusetts legislature.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — STATUTES REGULATING HOURS OF LABOR. — A New York statute rendered it a misdemeanor to require or permit an employee in a bakery or confectionery establishment to work more than sixty hours

per week, or more than ten hours per day, unless for the purpose of making a shorter work-day of the last day of the week. *Held*, that the statute is unconstitutional as an improper exercise of the police power. *Harlan, White, Day, and Holmes, JJ.*, dissented. *Lochner v. State of New York*, U. S. Sup. Ct., April 17, 1905.

This reversal of the opinion of the New York Court of Appeals is significant as a check to the prevalent legislative tendency to enact labor laws. If such a statute is reasonably calculated to promote the public health and safety, courts, however dubious of the wisdom of its enactment, must sustain it as a reasonable exercise of the police power. *Jacobson v. Massachusetts*, 25 Sup. Ct. Rep. 358, 363. The real test is, whether the legislature has arbitrarily curtailed the individual's liberty, or has merely restricted his freedom to conserve the public interest. The majority determines that, as a matter of common understanding, the baker's trade is not an unhealthy one, and therefore the restraint imposed is unreasonable. See 17 HARV. L. REV. 418. The minority strongly combats this result, and Justice Harlan's dissent forcefully points out that the majority view brings under the court's supervision what has hitherto been regarded as the exclusive domain of the state legislatures. It may be suggested that the probable consequent reluctance to pass labor measures is likely to increase trade union activity to enable workmen to obtain benefits unaided by paternal legislation.

CONSTRUCTIVE TRUSTS — EFFECT OF STATUTE OF FRAUDS — ABSOLUTE CONVEYANCE AND ORAL PROMISE TO RECONVEY. — *Held*, that an owner of a half-interest in land who conveys his share to his co-owner upon an oral agreement by the latter to reconvey is entitled to a reconveyance because of the fiduciary relation of the parties. *Koefoed v. Thompson*, 102 N. W. Rep. 268 (Neb.). See NOTES, p. 614.

CONTRACTS — REMEDIES FOR BREACH — JUDGMENT ON INSTALMENTS ALREADY DEFAULTED A BAR TO RECOVERY FOR REMAINDER. — The plaintiff contracted to purchase of the defendant a quantity of goods deliverable in instalments at a price payable on each delivery. After partial delivery the plaintiff obtained a judgment for breach in failing to make the deliveries then due, and upon maturity of all the instalments sued for breach of the remainder of the contract. *Held*, that he cannot recover, since the cause of action relied upon in the former suit was a breach of the entire contract and the judgment therein is conclusive. Two justices dissented. *Pakas v. Hollingshead*, 99 N. Y. App. Div. 472.

The distinction is not always kept in view that while but one judgment is possible upon a single cause of action, a number of causes of action may issue from one contract. Theoretically it would seem that there are as many causes of action upon an instalment contract as there are failures to deliver; that if the breach is material the injured party may elect to rescind the contract, or to consider it still existing and pursue his remedies upon it; and that the remedies of buyer and seller should be the same. *Cf. Richmond v. Dubuque, etc., R. Co.*, 40 Ia. 264. Two rules of procedure, however, qualify the plaintiff's rights. He must unite actions for all breaches subsisting at the time of suit. *Reformed, etc., Church of Westfield v. Brown*, 54 Barb. (N. Y.) 191. If the breach amounts to total repudiation, one judgment bars his remedies, for upon instalments not due damages are confined to profits, and those are recoverable immediately. See *Clark v. Mursiglia*, 1 Den. (N. Y.) 317. Whether or not there is repudiation must be determined from the evidence; but in the present case it may, perhaps, fairly be questioned whether the mere failure to deliver the earlier instalments should be thus construed.

CORPORATIONS — FOREIGN CORPORATIONS — WHAT CONSTITUTES DOING BUSINESS. — A Pennsylvania insurance corporation regularly solicited business in New York, insured property there by contracts made in Pennsylvania through the mails, and sent its agents to New York to adjust losses. *Held*, that for the purpose of jurisdiction over the corporation it is doing business in New York. *Pennsylvania, etc., Insurance Co. v. Meyer*, U. S. Sup. Ct., April 3, 1905.

The question what constitutes doing business by a foreign corporation is usually presented under a state statute imposing conditions thereon, — the payment of a tax, for example, or the filing of a certificate of its financial condition. The natural meaning of the term is often variously warped and narrowed in accordance with the supposed intent of the legislature to avoid interference with some policy of the state or with interstate commerce. *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119, 148; *Coit & Co. v. Sutton*, 102 Mich. 324. In that line of cases the temper of the courts is decidedly against the decision in the principal case. *People v. Gilbert*, 44 Hun (N. Y.) 522; *New Orleans v. Virginia, etc., Insurance Co.*, 33 La. Ann. 10. But here the question is whether the corporation has not done business in the state so that it may fairly

be subjected to jurisdiction on proper service. The court is restrained by no adverse policy; it is rather encouraged to furnish domestic relief to domestic plaintiffs, and may well decide on the natural, though difficult, basis of fact. This distinction is not expressed in the cases, but, it is submitted, will avoid some of the confusion on the subject. *Cf. Colorado Iron-Works v. Sierra Grande Mining Co.*, 15 Col. 499.

CORPORATIONS — PROMOTERS — LEASE TO CORPORATION TO BE FORMED. — A lease was executed to an association not at the time in existence. After incorporation the association accepted the lease, entered into possession of the premises, and for several years paid rent in accordance with the terms of the lease. This action for subsequently accruing rent was brought against its directors, under a statute imposing liability upon them for debts of the association payable within one year from the date when they were contracted. *Held*, that there can be no recovery against the defendants, since the liability of the association for rent due was incurred, not by use and occupation, but under the covenant in the lease. *Thistle v. Jones*, 45 N. Y. Misc. 215.

By the decided tendency of American authority corporations may assume the obligations of contracts made in their behalf by promoters. The technical difficulties in the way of reaching this result have given rise to considerable diversity of reasoning on the part of the courts, the usual ground of decision being either ratification or adoption, while in a few cases a novation has been implied. See 12 HARV. L. REV. 506; 14 *ibid.* 536. Where the obligation is in form a lease under seal, however, it would seem that at best only a tenancy from year to year could be established on any of these grounds. This added difficulty is obviated in the principal case by the court's presuming from the facts an assignment of the lease to the corporation, since an assignee of a lease is liable on the covenants therein. Such a presumption is permitted by the law of New York, and the court's line of reasoning in taking advantage of it is entirely in accord with the spirit of the American cases. *Cf. Bedford v. Terhune*, 30 N. Y. 453.

CORPORATIONS — STATUTORY LIABILITY OF STOCKHOLDERS — ENFORCEMENT IN FOREIGN JURISDICTIONS. — An Ohio statute provided for the enforcement of individual liability of stockholders in corporations by an action against all the stockholders for the benefit of all the creditors of the corporation, and indicated a maximum amount of costs recoverable against a stockholder in such an adjudication. *Held*, that the remedy thus provided cannot be pursued outside of Ohio. *Middletown National Bank v. Toledo, etc., Ry. Co.*, 25 Sup. Ct. Rep. 462.

It is now well settled that a stockholder is under no liability to creditors of the corporation beyond the amount of his subscription unless such liability is imposed by statute. *Gray v. Coffin*, 9 Cush. (Mass.) 192. If liability is imposed by a statute of the state in which a corporation is chartered it will ordinarily be enforced by the courts of another state against stockholders within their jurisdiction. *Flash v. Conn.*, 109 U. S. 371. The principal case shows, however, an important qualification to this general rule. If the liability created by the statute can be enforced only by some particular form of procedure it cannot be enforced in a foreign state unless the same kind of proceedings may be taken there. *May v. Black*, 77 Wis. 101. This doctrine seems obviously sound. Although stockholders assume the obligations imposed by the laws under which they are incorporated, they cannot be said to assume any others, and a view opposed to that illustrated by the principal case would subject stockholders residing outside of the state of incorporation to a burden greater than that borne by domestic stockholders. See *Bank v. Franklyn*, 120 U. S. 747.

CORPORATIONS — STATUTORY LIABILITY OF STOCKHOLDERS — NATURE OF LIABILITY OF STOCKHOLDER IN NATIONAL BANK. — A statute of Washington limited the right to bring an action upon a contract, express or implied, to three years. *Held*, that the liability of a stockholder in a national bank to creditors is not embraced within the statute. White, Brown, and McKenna, JJ., dissented. *McClaine v. Rankin*, 25 Sup. Ct. Rep. 410.

The statutory liability of ordinary stockholders is generally regarded as contractual. See 18 HARV. L. REV. 456. Accordingly an assignee of a claim against a corporation gets his assignor's right against stockholders. *Blakeman v. Benton*, 9 Mo. App. 107. Again, this right may be enforced outside of the state creating it, and will survive against the representative of a deceased stockholder. *Flash v. Conn.*, 109 U. S. 371; *Richmond v. Irons*, 121 U. S. 27. So, too, a statute repealing a provision for individual liability is unconstitutional. *Hawthorne v. Calef*, 2 Wall. (U. S.) 10. Finally, the right is barred by the statute limiting the remedy on contracts. *Carroll v. Green*, 92 U. S. 509. The court seeks to distinguish the latter case from the present one, on the ground that

there the stockholder's liability to creditors was direct, while here it does not arise until an assessment by the comptroller. This ignores the difference between obligation and liability. The obligation is part of the stockholder's contract of subscription and is therefore contractual; but his liability is subject to the condition precedent of an assessment by the comptroller. Moreover this assessment would seem to provide a mode of enforcing the obligation rather than to affect its creation. The decision is contrary to *dicta* in previous cases. See *Matteson v. Dent*, 176 U. S. 521, 526.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — DISTRIBUTION OF DIVIDENDS BETWEEN LIFE TENANT AND REMAINDERMAN. — A corporation having assets valued far above its nominal capital, sold part of the property and declared a cash dividend from the proceeds. Both the life tenant and the remainderman of certain stock demanded the dividend, the former claiming it as declared from profits, the latter, as arising from surplus which by permanent investment had become capital. *Held*, that the life tenant is entitled to the dividend. *Smith v. Dana*, 60 Atl. Rep. 117 (Conn.).

Under the Massachusetts rule, by which cash dividends go to the life tenant as income, and stock dividends to the remainderman as capital, this case seems correct. *Minot v. Paine*, 99 Mass. 101. However, if a dividend is clearly declared from the proceeds of the sale of part of the capital stock, it goes to the remainderman. *Heard v. Eldredge*, 109 Mass. 258. That exception does not seem to apply here, for as the property value still exceeds the nominal capital of the corporation, the capital stock remains intact. Furthermore, surplus invested in permanent improvements would seem to become capital only in the broad sense of funds engaged in the business, which, unless new stock had been issued, directors could again withdraw and distribute as profits. MORAWETZ, PRIVATE CORPORATIONS, 2d ed., §§ 452, 453. But see *Hemenway v. Hemenway*, 181 Mass. 406. Under the Pennsylvania rule that surplus earned before the death of the testator goes to the remainderman, and that earned thereafter, to the life tenant, irrespective of the form of the dividend, the remainderman would be entitled here. For a discussion of the merits of these different rules, see 16 HARV. L. REV. 54.

CRIMINAL LAW — NEGLIGENCE — RESPONSIBILITY FOR FAILURE TO USE PRAYER. The defendant, honestly believing prayer to be the only efficacious remedy for disease, neglected to furnish either medical attendance or prayer for an ailing minor to whom he stood *in loco parentis*. No statute within the jurisdiction required a parent to furnish medical attendance to a sick child. *Held*, that the defendant cannot be convicted of homicide. *State v. Sanford*, 59 Atl. Rep. 597 (Me.).

The common law generally refuses to hold a parent for failure to provide medical attendance in which he conscientiously disbelieves, the reason being the absence of *mens rea*. *Regina v. Wigstaffe*, 10 Cox C. C. 532. For him certain remedies are as if non-existent. When the parent wantonly fails to furnish what he conscientiously can, the question must yet arise whether that omission has any causal connection with the fatality. Certain methods of treating the sick are almost uniformly recognized as scientific and effectual. If they be carelessly withheld a jury may hear testimony as to their efficacy under the circumstances. But upon the efficiency of unaided prayer society is not so nearly agreed. The jury has then no premise upon which to base their investigation, the result of which will therefore depend upon the accidental beliefs of the twelve individuals. In such a case, the court well says, the prisoner cannot properly be tried. Statutes have elsewhere sought to avoid this disappointing result by imposing upon parents a definite legal duty.

DEEDS — QUITCLAIM DEEDS — OPERATION UNDER RECORDING ACTS. — A recording act provided that every conveyance should be void as against a subsequent purchaser in good faith whose conveyance was first recorded. *Held*, that the grantee in a subsequent quitclaim deed is not protected as a purchaser in good faith against a prior unrecorded warranty deed. *Forster v. Will*, 102 N. W. Rep. 598 (S. Dak.).

At common law, since a quitclaim deed purports to convey only such right as the grantor has, the grantee is put upon inquiry and takes the estate subject to existing claims, legal and equitable. *Cf. Oliver v. Platt*, 3 How. (U. S.) 333, 410. By a number of courts this doctrine has been used to interpret the recording acts. *Steele v. Sioux Valley Bank*, 79 Ia. 339. But those courts illogically fail to affect with notice one who takes by deed of warranty from the grantee of a quitclaim deed. *Winkler v. Miller*, 54 Ia. 476. The recording laws, however, provide a statutory estoppel for the protection of innocent purchasers. And, since it is neither necessarily nor usually true that a quitclaim deed comes to its grantee tainted with distrust, it seems that he should be equally protected if he has purchased in good faith, for value, and without

notice of prior conveyances. Such has become the prevailing view. *Boynnton v. Haggart*, 120 Fed. Rep. 819. If this form of deed affects at all the rights of the purchaser, it should be only to direct the attention of the jury to the question of notice or good faith in purchasing. *Cf. Mansfield v. Dyer*, 131 Mass. 200.

EASEMENTS — EXTINGUISHMENT — SUSPENSION BECAUSE OF MISUSER. — A way appurtenant to certain premises was being used for the benefit of adjoining land in such manner that it was impossible to separate the lawful from the unlawful user. *Held*, that the easement is not extinguished, but that the defendant and its agents will be enjoined from using the easement and from extending invitation or furnishing occasion to tenants or others to use it, until the wrongful user is made impossible. *McCullough v. Broad Exchange Co.*, 92 N. Y. Supp. 533. See NOTES, p. 608.

ESTOPPEL — ESTOPPEL IN PAIS — STANDING BY WHILE IMPROVEMENTS ARE MADE ON LAND. — The defendant obtained a deed of certain land from a stranger to the title. The true owner, who learned of this transaction within ten days, stood by in silence for three years while the defendant made improvements on the land, and then brought action to quiet title. *Held*, that the plaintiff is estopped to deny the defendant's title. *Baillarge v. Clark*, 79 Pac. Rep. 268 (Cal.).

It is generally accepted law that where an owner of chattels or land stands by and allows another to pay value to a stranger under the belief that he is acquiring title the owner will be estopped to assert his right. *Pickard v. Sears and Barrett*, 6 Ad. & El. 469; *Chapman v. Chapman and Gansammer*, 59 Pa. St. 214. The justice of this rule is obvious, for if the price paid for the land is adequate, the buyer's gain by the estoppel will be equal to his loss by the owner's neglect. A more questionable rule is applied in the principal case. There the damage caused by the owner's carelessness was the value of the improvements only, for he did not stand by during the *pseudo* sale; but the gain to the buyer by the estoppel was the value of the land as well as of the improvements. As these particular improvements were in the form of a railroad bed, the plaintiff could not have been allowed to recover on condition that he pay for them; but the same result has been reached in the case of an ordinary house. *Green v. Smith*, 57 Vt. 263. Such a result seems unduly severe.

FIXTURES — RAILS OF STREET RAILWAY AS FIXTURES. — *Held*, that rails affixed to the soil of a public street by an electric railway company are personality. *Lorain Steel Co. v. Norfolk, etc., Ry. Co.*, 73 N. E. Rep. 646 (Mass.). See NOTES, p. 610.

ILLEGAL CONTRACTS — PUBLIC POLICY — CONTRACT TO CONVEY ALL AFTER-ACQUIRED PROPERTY. — As part of the consideration for admission into the plaintiff institution, the defendant agreed to convey to it all property that he might afterwards acquire. The plaintiff reserved the right to require the defendant's removal, if he disobeyed the rules of the institution or if he became insane. *Held*, that the contract is unenforceable as against public policy. *Baltimore, etc., Homes v. Pierce*, 60 Atl. Rep. 277 (Md.).

The assignment of a contingent interest or mere expectancy will be given effect in equity, not as a grant but as a contract, if fairly made and not against public policy. *McDonald v. McDonald*, 5 Jones Eq. (N. C.) 211; *Stover v. Eycleshimer*, 46 Barb. (N. Y.) 84. The only ground, then, for refusing damages at law in the principal case, there being good consideration and no fraud, is that of public policy. This entails a balancing of opposing considerations, the relative importance of which may well be the subject of difference of opinion. On the whole, however, it would seem that the possibility of hardship to this defendant was of minor importance as against the desirability of maintaining freedom of contract; and that, as the plaintiff was a charitable institution for aged people, the possibility of the defendant's becoming a public charge through removal, after having conveyed property subsequently acquired, was counterbalanced by the probability of his becoming a public charge unless admitted. Notwithstanding the view taken by the court, therefore, it may fairly be contended that the public welfare would be subserved rather than injured by the enforcement of such contracts.

LEGACIES — LAPSED BEQUESTS — APPLICATION OF STATUTE PREVENTING LAPSE. A statute provided that "whenever any estate shall be bequeathed to a child of the testator, and such child shall die during the lifetime of the testator, leaving a child who shall survive such testator, such legacy shall not lapse, but the property so devised shall vest in the surviving child of the legatee." A testator directed his executor to pay "five hundred dollars to each of my children." *Held*, that the issue of a son known by the testator to have died before the execution of the will are entitled to five hundred dollars. *Pimel v. Betjemann*, 99 N. Y. App. Div. 559.

Under this statute it has been held that the issue of a son specially named in the will, who was dead when the will was made, would take. *Barnes v. Huson*, 60 Barb. (N. Y.) 593. And under a similar statute the same result was reached on those facts, even though the testator knew that the child was dead when the will was executed. *Barkworth v. Young*, 4 Drewry 1. The reason for these decisions is that the testator probably intended to benefit the estate of persons specifically named. *Mower v. Orr*, 7 Hare 473. The rights of the issue under the statute are, however, substitutionary, and where, as in the principal case, the father was not specially named it is difficult to see how there was any gift intended for him in respect to which his issue may be substituted. The decision is opposed to the only similar case found, and seems antagonistic in principle to the rule of construction adopted in those cases where, independently of statute, the testator attempts to give the issue their deceased parents' share by way of substitution. *Howland v. Slade*, 155 Mass. 415; *In re Hotchkiss's Trusts*, L. R. 8 Eq. 643.

LIMITATION OF ACTIONS — IGNORANCE OR FRAUD — FRAUDULENT CONCEALMENT OF CAUSE OF ACTION. — The Wisconsin statute of limitations excepted from its scope certain actions based on fraud until the discovery by the aggrieved party of the facts constituting the fraud. To a plea of this statute the plaintiff replied that the defendant had fraudulently concealed the cause of action. *Held*, that since the action does not come within the excepted class, it is barred. *Pietsch v. Milbrath*, 102 N. W. Rep. 342 (Wis.).

In construing statutes of limitations containing no exemption clauses, some courts have been inclined to deny the defense to one who has concealed the existence of the plaintiff's cause of action for the statutory period. *Cf. First, etc., Corporation v. Field*, 3 Mass. 201. Several of these decisions, however, may perhaps be explained on the ground that in their jurisdictions there were no equity courts to relieve the plaintiff against its effect. And the better opinion certainly holds that no exception can be read into such a statute. *Board, etc., of Somerset v. Veghte*, 44 N. J. Law, 509. When, as in the present case, the legislature has provided that causes of action based upon fraud, which have been concealed, shall not be deemed to have accrued until discovered, it would seem clear that according to a well recognized canon of statutory construction causes of action not based on fraud should not be entitled to the same exemption. See *Amy v. City of Watertown*, 22 Fed. Rep. 418, 420. The present case, therefore, seems preferable to a contrary decision reached under a similar statute in Iowa. *Cf. District, etc., of Boomer v. French*, 40 Ia. 601.

MORTGAGES — PRIORITY — RIGHT OF PRIORITY OVER THE CORPORATE MORTGAGE. — The petitioner sold railway ties to a quasi-public corporation one month prior to the appointment of a receiver. *Held*, that the petitioner's claim is not preferred over a prior mortgage. *Gregg v. Metropolitan Trust Co.*, 25 Sup. Ct. Rep. 415. See NOTES, p. 605.

NOTICE — CONSTRUCTIVE NOTICE — PURCHASER FROM DISSEISOR HAS NOTICE OF DEED TO DISSEISEE. — A disseisor held land for the statutory period and sold to one without actual or record notice of the deed to the disseisee. *Held*, that the buyer has constructive notice of recitals in that deed. *Re Nesbitt and Potts' Contract*, 53 W. R. 297 (Eng., Ch. D.).

Where a purchaser cannot make out title except by a deed which leads to another fact, he is presumed to have knowledge of that fact. *Patman v. Harland*, 17 Ch. D. 353, 355; *Van Doren v. Robinson*, 16 N. J. Eq. 256, 261. Title by adverse possession is a new title not derived from the disseisee. *Tichborne v. Weir*, 67 L. T. R. 735. Nevertheless the estate acquired is limited in extent by the estate to which it was adverse. If, for example, that was a life estate, the disseisor's estate can be only *pur autre vie*, for as it was never adverse to the remainder it could not extinguish it. *Moore v. Luce*, 29 Pa. St. 260. It follows that in no case can the buyer from the disseisor establish absolute title without referring to the deed to the disseisee to find his interest. Therefore, although no application of the general rule has been found except to deeds through which title is actually derived, yet as the basis of it is not derivation but reasonable proof of title, it seems logically to apply to the case in hand, subject to qualification where access to the deed is practically impossible. See *Patman v. Harland*, 17 Ch. D. 353, 356.

PERPETUITIES — RULE AGAINST A POSSIBILITY ON A POSSIBILITY. — A testatrix devised realty to trustees and their heirs in trust to pay the income to her children and the survivor for life, and then to their children for lives. To the survivor of the latter she devised the property in tail. *Held*, that the rule against perpetuities applies to

legal contingent remainders and so makes the gift in tail void. *In re Ashforth's Trusts*, 21 T. L. R. 329 (Eng., Ch. D.).

This decision, though by a single judge, may well settle the English law on the point. For a discussion of the question, approving the conclusion of this case, see 16 HARV. L. REV. 294.

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION. A surgeon, by telling his patient that a very slight operation was necessary, induced her to take ether, and removed her uterus. *Held*, that the patient may recover exemplary damages. *Pratt v. Davis*, 37 Chic. Leg. N. 213 (Ill., App. Ct., First Dist., 1905).

It is usually said that a surgeon must obtain the patient's consent before performing an operation; and it seems clear that such an act, being a battery, requires justification. It is sometimes contended, however, that a surgeon may be justified by various circumstances other than the acquiescence of the patient; and an English case has been found which, although decided upon the ground of implied consent, can hardly be supported on that basis. *Cf. Beatty v. Cullingworth*, 10 HARV. L. REV. 376. This court is clearly disinclined to permit surgeons to remove an organ from the body without the patient's actual concurrence; and in view of the serious interference with the person which such an act involves, this rule should be applied wherever consent could possibly have been obtained. However, if in order to save life an operation must be performed before consent can be obtained, practical necessity would seem to justify the surgeon in acting; and the jury should be allowed to decide whether he could fairly assume that the plaintiff would have consented.

PLEDGES — WRONGFUL RE-PLEDGE — TROVER BY PLEDGOR WITHOUT TENDER. *Seem*, that a pledgee who wrongfully sells or re-pledges is not liable to his pledgor in trover without a tender of the debt. *Ames v. Sutherland*, 5 Ont. W. Rep. 328. See NOTES, p. 610.

PRESUMPTIONS — NATURE AND SCOPE — RELATION OF PRESUMPTIONS TO EVIDENCE. — A guardian was made a beneficiary under the will of his ward. *Held*, that the consequent presumption of undue influence not only places upon the guardian the burden of proof, but should be weighed as evidence by the jury. *In re Cowdry's Will*, 60 Atl. Rep. 141 (Vt.).

The court considers the views of Professor Thayer upon the subject of presumptions, but prefers to follow what seems to be the trend of authority in Vermont. A case in Connecticut, where the court reached a different conclusion, was noted in 18 HARV. L. REV. 546.

RESCISSION — RESCISSION FOR MISTAKE — UNILATERAL MISTAKE. — The plaintiff by mistake put in a lower bid for a contract than he had intended making. The defendant accepted the bid, without notice of the mistake. *Held*, that equity will rescind the contract. *Board, etc., of Indianapolis v. Bender*, 72 N. E. Rep. 154 (Ind., App. Ct.).

Equity will give rescission for a unilateral mistake against a donee. *Andrews v. Andrews*, 12 Ind. 348. In an analogous case, rescission has been granted of a conveyance in which by a unilateral mistake the grantee is getting what he did not expect, and what the grantor clearly did not mean to convey. *Brown v. Lamphear*, 35 Vt. 252. Such relief may also be had where the defendant in accepting an offer or conveyance knowingly took advantage of the plaintiff's error. *Garrard v. Frankel*, 30 Beav. 445. But with these exceptions, the great weight of authority is that equity will not give rescission for a mere unilateral mistake. *Moffett, etc., Co. v. City of Rochester*, 91 Fed. Rep. 28; *contra, Harris v. Pepperell*, L. R. 5 Eq. 1 (*seem*). Much may be said in favor of the exercise of the jurisdiction to rectify mistakes in a case where nothing has been done under a hard bargain which the plaintiff did not intend to make: but the difficulty of deciding what is a sufficiently damaging mistake, and the fact that a door would be opened to the admission of all manner of excuses for improvident contracts, as a matter of policy, perhaps justify a denial of relief.

RESTRAINT OF TRADE — STATE ANTI-TRUST LEGISLATION — CONSTRUCTION. — A statute provided that a contract between two or more corporations restraining competition in business or placing the management of the affairs of the corporations in the power of any persons other than their proper agents should be unlawful. Several railroad companies formed a car service association for the purpose of insuring impartial assessment of demurrage. To this end certain rules were adopted and a manager was appointed to attend to their proper enforcement. *Held*, that upon a proper con-

struction of the statute it is not violated by this combination, which is not inimical to public welfare. *Yazoo, etc., R. R. Co. v. Searles*, 37 So. Rep. 939 (Miss.).

The court decided that this combination did not place the business of the corporations in the control of the management of the association, and construed the statute as being inapplicable to combinations which would not, in their results, be at variance with public policy. The decision well illustrates the tendency of the courts to give a liberal construction to what is called anti-trust legislation. See *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454. While these enactments are properly applied to combinations injurious to the welfare of the public, yet, in cases where their tendency is not harmful, the language, if possible, is regarded as limited by the power which each individual has to manage his own property. Cf. *Northern Securities Co. v. United States*, 193 U. S. 197, *per Brewer, J.*

RESTRICTIVE AGREEMENTS—LIABILITY OF PERSON HOLDING UNDER DISSEISOR. The defendant contracted to buy land from the plaintiff, assignee of a disseisor whose adverse possession had begun twenty-three years before. The disseisee had been bound by a negative restrictive covenant. *Held*, that the defendant may refuse to take the land, since the right of the covenantee would be enforceable against him. *Re Nesbitt and Potts' Contract*, 53 W. R. 297 (Eng., Ch. D.). See NOTES, p. 608.

RIGHT OF PRIVACY—INFRINGEMENT—UNAUTHORIZED USE OF PORTRAIT FOR ADVERTISING PURPOSES.—The plaintiff sued the defendants for damages resulting from the unauthorized use of his portrait in an advertisement. The defendants demurred. *Held*, that such publication is actionable as a violation of the right of privacy. *Pavesich v. New England, etc., Co.*, 50 S. E. Rep. 68 (Ga.).

Although the existence of a right of privacy has been much discussed of late years, this is the first decision of a court of last resort putting recovery squarely upon that basis. It is believed that an article in this REVIEW, cited in the principal case, first clearly declared that such a right existed. Cf. 4 HARV. L. REV. 193. Before that time no decisions relied upon its existence, but the courts based similar cases on breach of trust or violation of a property right. *Yovitt v. Winyard*, 1 J. & W. 394; *Pollard v. Photographic Co.*, 40 Ch. D. 345. Since then several cases in discussing the right of privacy have differed regarding its existence. One case which purports to deny it really decides only that the right is at most personal, ending at death. *Atkinson v. Doherty*, 121 Mich. 372. Prior to the principal case the only square decision by a court of last resort held that no such right existed. *Roberson v. Rochester, etc., Co.*, 171 N. Y. 538; see 15 HARV. L. REV. 227. This court was divided, its decision was received with regret, and the legislature soon passed a law to meet the evil. It seems probable, therefore, that the principal case will have a following.

SALES—CONDITIONAL SALES—FOREFEITURE OF INSTALMENTS.—The trial court refused to rule that when the buyer in a conditional sale makes default as to one instalment all prior instalments are forfeited. *Held*, that the refusal is not error. *Shafer v. Russell*, 79 Pac. Rep. 559 (Utah). See NOTES, p. 611.

SPECIFIC PERFORMANCE—GENERAL NATURE AND SCOPE OF EQUITABLE RELIEF—ADEQUACY OF LEGAL REMEDY IN CONTRACTS FOR SALE OF LAND.—The defendant, for valuable consideration, gave the plaintiff an option to buy a piece of land for the sum of nine thousand dollars. The plaintiff's bill for specific performance alleged that he had contracted to sell the land to a third person for fourteen thousand dollars. The defendant demurred. *Held*, that inasmuch as the plaintiff, on his own showing, has an adequate remedy at law, he must seek his remedy there. *Haselton v. Miller*, 33 Wash. Law Rep. 217.

Contracts to sell land which the seller has agreed to buy or on which he holds an option are of every-day occurrence. Yet no case has been found where the original seller has been allowed to set up his purchaser's contract for resale as a defense to a suit for specific performance. Originally, of course, the jurisdiction of equity in contracts concerning real estate was based on the difficulty of a fair appraisal of the value of the land to the purchaser, but the relief has long since been allowed as a matter of course. See STORY, EQ. JUR., 12th ed., §§ 717, 751. *Contra*, in suits by the vendor, *Porter v. Land Co.*, 84 Me. 195; *Kauffman's Appeal*, 55 Pa. St. 383. Sustaining a demurrer, therefore, in the principal case, where a plea ought to have been of no avail, seems unfortunate. The plaintiff did not even ask for an alternative remedy—specific performance or the value of his bargain. Cf. *Dowling v. Beljemann*, 2 John. & H. 544. Moreover, the court entirely overlooked the fact that, by refusing the plaintiff relief, they were not only exposing him to an action by his purchaser, but also depriving the latter of his right to specific performance of his contract. Cf. *Shriver v. Seiss*, 49 Md. 384.

STATUTE OF FRAUDS — SUFFICIENT MEMORANDUM — UNDELIVERED DEED AS MEMORANDUM. — The defendant agreed to grant the plaintiff a lease, only part of the terms of which was contained in the memorandum delivered to the plaintiff. The remaining terms were supplied by the lease later executed by the defendant, but retained in its possession. *Held*, that the prior writing and the lease together constitute a sufficient memorandum to satisfy the Statute of Frauds. Four justices dissented. *Charlton v. Columbia Real Estate Co.*, 60 Atl. Rep. 192 (N. J., Ct. App.).

In England it has been held that the memorandum of a sale need not be delivered in order to satisfy the Statute of Frauds. *Johnson v. Dodgson*, 2 M. & W. 653. A Maryland case reaches the same result. *Drury v. Young*, 58 Md. 546. The great weight of American authority, however, holds the requirement unsatisfied if possession of the memorandum be retained by the party to be charged. Hence a deed containing the particulars of a sale of land is not a sufficient memorandum unless delivered by the grantor. *Parker v. Parker*, 1 Gray (Mass.) 409; but see *Parrill v. McKinley*, 9 Gratt. (Va.) 1. On the other hand, the American courts generally hold, with the principal case, that an undelivered deed is available to supplement an incomplete delivered memorandum. *Wood v. Davis*, 82 Ill. 311. On this last ground the New Jersey court distinguishes an earlier decision in which an undelivered deed was held insufficient by itself. *Brown v. Brown*, 33 N. J. Eq. 650. Inasmuch as the memorandum ordinarily operates by way of admission, on principle the question of delivery would seem to be irrelevant. The American rule requiring delivery is apparently due to a failure to distinguish between the writing as evidence to satisfy the statute and as a written contract.

SURETYSHIP — VARIATION OF RISK — EFFECT OF PLAINTIFF'S BREACH OF CONTRACT TO INSURE. — The defendant was a surety for a building contractor, whose contract provided that the plaintiff, the owner, should insure for his own and the contractor's benefit. *Held*, that the defendant is not discharged, by the plaintiff's failure to insure, since, as no fire occurred, he was not injured thereby. *Hohn v. Shideler*, 72 N. E. Rep. 575 (Ind., Sup. Ct.).

Variation of the surety's risk occurs either where the obligee has done something which, owing to the relationship of the parties, he should not have done, or where there has been a material alteration of the contract of suretyship. *Cf.* 16 HARV. L. REV. 511. In the first case, as where additional securities, not stipulated for in the contract of suretyship, are released, the defense, being an equitable one, discharges the surety only in proportion to his possible injury. *Green v. Blunt*, 59 Ia. 79. In the second case, the defense, being legal, is a complete discharge, regardless of harm to the surety. *Miller v. Stewart*, 9 Wheat. (U. S.) 703. In a case similar in other respects to the present one, a fire, occasioning some loss, occurred, and it was held that the surety was completely discharged. *Watts v. Shuttleworth*, 7 H. & N. 353. The decision there regarded the surety's undertaking as changed by the owner's failure to insure. Under this view, which seems the correct one, the absence of actual injury to the surety, considered decisive in the principal case, is immaterial. *Cf. Bethune v. Dozier*, 10 Ga. 235.

TRUSTS — CREATION AND VALIDITY — REVOCATION. — The plaintiff's intestate made a deposit of her own money in a savings bank "in trust for Margaret Brown," and prior thereto declared her intention that the account should be for the benefit of the person designated. *Held*, that an irrevocable trust is thereby created. *O'Brien v. Williamsburg Savings Bank*, 101 N. Y. App. Div. 108.

This appears to be an effort, on the part of the Appellate Division, to escape from the doctrine laid down by the Court of Appeals in *In re Totten*, 179 N. Y. 112, which was adversely criticised in 18 HARV. L. REV. 70.

WATERS AND WATERCOURSES — SURFACE WATERS — RIGHT TO DRAIN SURFACE WATER FROM ADJOINING LAND. — The parties owned adjoining lands covered by a body of water twenty-five hundred acres in area, fed solely by rain and snow, and varying in depth from three to six feet. The defendant, in order to reclaim his land, constructed thereon a ditch which drained the water from the plaintiff's land and ruined his valuable fishery. *Held*, that the plaintiff cannot recover. *Applegate v. Franklin*, 84 S. W. Rep. 347 (Mo., St. Louis Ct. App.).

The fact that surface water collects temporarily in considerable quantities in a natural depression, does not alter its character. *Boynton v. Gilman*, 53 Vt. 17. But if the pond formed be permanent, it ceases to be surface water, and may not be drained without the consent of all whose land it covers. *Schaefer v. Marthaler*, 34 Minn. 487. Assuming that the court correctly found the pond in question to be surface water, the case raises a new problem: whether for purposes of improvement one may arti-

ficially drain his land and thereby deprive an adjoining proprietor of surface water. An upper owner may not, by artificial drainage, discharge a body of surface water upon lands below. *Rhoads v. Davidheiser*, 133 Pa. St. 226. But he has an absolute right to surface water before it reaches the lower owner. *Broadbent v. Ramsbotham*, 11 Exch. Rep. 602. Even in jurisdictions which limit the owner's right in percolating waters to reasonable user, artificial drainage thereof for purposes of improvement is lawful, though it deprive a neighbor of his supply. *Ellis v. Duncan*, 21 Barb. (N. Y.) 230. These last two analogies tend to support the present decision, whether we regard the defendant's right to surface water as absolute or as restricted to reasonable user.

WILLS — EXECUTION — SIGNATURE OF TESTATOR AT END OF WILL. — In a will drawn upon a printed form consisting of one page, a sentence which was incomplete at the end of the space provided for bequests was finished by the testator upon the back of the form, without words or characters of reference to connect the two parts. The will was signed and attested at the bottom of the first page. *Held*, that the words on the back should be read as an interlineation, and the whole, as thus read, admitted to probate. *In the Will of Bull*, 1905 Vict. L. Rep. 38.

The testator's signature to a will need not necessarily be at its physical termination, if it follows the close of the connected literary sense. *In the Goods of Kimpton*, 3 Sw. & Tr. 427. Thus, by appropriate words or marks, a portion necessary to complete the will may be introduced into the body, although in location upon the paper it follows the signature. *In the Goods of Birt*, L. R. 2 P. & D. 214; *Baker's Appeal*, 107 Pa. St. 381. In requiring the signature at the end, the English and Victorian acts differ from the American statutes by the addition of 15 and 16 Vict., c. 24, which has been regarded as permitting the court to consider what the testator intended to be the end of his will. See *Matter of Conway*, 124 N. Y. 455. Doubtless that amendment did temper the English rule, but it still provides that no part of the will shall follow the signature, and seems insufficient to explain this case without recourse to the principle of incorporation by reference. That, however, requires such words or marks within the will as to identify the outside writing with certainty. *In the Will of Ellen Wyatt*, 21 Vict. L. Rep. 571. It seems too ample an extension of the principle to permit mere continuity of sense to furnish that reference.

WITNESSES — IMPEACHMENT — PREVIOUS HYPNOTISM OF WITNESS. — *Held*, that an admission by a witness on cross-examination that she had three times been hypnotized by the prisoner is admissible as affecting her credibility. *State v. Exum*, 50 S. E. Rep. 283 (N. C.).

The effect of hypnotism upon witnesses presents a new and interesting problem. In its analysis the distinction should be clearly kept between the condition of the witness when in a state of hypnosis and that when acting from suggestions placed during a previous state of hypnosis. In the former, his senses are necessarily so much in abeyance that detection would be inevitable; and as his mind is under the control of another, he should be held incompetent. *Cf. Worthington & Co. v. Mercer*, 96 Ala. 310. But if the witness is acting from suggestions placed during a previous state of hypnosis, his independence is taken away only to the extent of such suggestions. To determine his competency, therefore, the judge must find whether it is probable that he has been placed under hypnotic control at a time and under circumstances when suggestions could have been and were placed as to the facts in the case. *Cf. Bartlett v. Smith*, 11 M. & W. 483. If this is probable, as the witness would follow out suggestions so placed irrespective of the actual facts, he should be held at least incompetent to testify in behalf of the party responsible for his condition.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

PARTIAL REVOCATION OF A WILL BY OBLITERATION. — In a recent article the question whether or not a will may be partially revoked by obliteration is discussed, and the few cases in point reviewed. *The Partial Revocation of a Will by Obliteration*, Anon., 9 L. Notes (N. Y.) 5 (April, 1905). In those jurisdictions where the English Statute of Frauds has been followed, it is provided

that a will, "or any clause thereof," may be revoked by obliteration. In the application of this provision a doubt has arisen whether an obliteration should be considered ineffectual which increases an estate already given, or causes a different disposition of it, on the ground that it is, in effect, an attempt to dispose of property by will without the formalities of execution and attestation. The authorities bearing upon the question are inconsistent and confusing. According to one view, suggested by two English decisions, a will may be partially revoked by obliteration when the effect is to decrease a gift theretofore made, but not when it is to enlarge such a gift. Cf. *Larkins v. Larkins*, 3 Bos. & Pul. 16; *Swinion v. Bailey*, 4 App. Cas. 70. Thus upon a devise to "A and his heirs forever" an obliteration of the words "and his heirs forever" would operate to give a life estate to A; but a blotting out of the words "and B as tenants in common" in a devise to "A and B as tenants in common" would not be effective. A more radical position was taken in a Maryland case where the court, construing the word "clause" to mean an entire subdivision of the will, held that the obliteration must be of the whole subdivision, for otherwise there would be an unattested alteration of the disposition of the property. *Eschbach v. Collins*, 61 Md. 478. Both these views are open to the objection that they would permit revoked legacies and devises to pass under a residuary clause, though the result thereby reached would be that which they seek to avoid. A later American decision, recognizing this logical difficulty, held that there could be no partial revocation by obliteration where the effect would be to alter a bequest either to a residuary or to a specific legatee. *Appeal of Miles*, 68 Conn. 237. Finally, Massachusetts has adopted the view that there may be partial revocation regardless of its effect upon the disposition of the estate. Cf. *Bigelow v. Gillott*, 123 Mass. 102.

It seems, as the writer observes, that there can be but two sound doctrines. Either partial revocation by obliteration must be held not permissible, or it must be allowed no matter what its effect upon the disposition of the estate. The former of these doctrines could be maintained only in those states where the statute does not expressly permit partial revocation; and it could not apply to a case where, owing to the absence of a residuary clause, the obliteration would not alter the effect of the remaining portions of the will upon the disposition of the testator's property. For the other view there is much to be said. It is not only simple and easy of application, but it seems also consistent with a reasonable construction of the statutes requiring execution of a will in the presence of witnesses. These statutes are not concerned with the ultimate effect of the will upon the distribution of the testator's estate. He may by non-testamentary acts dispose of his property without regard to the terms of his will, or he may by an unattested act of cancellation revoke it *in toto*. The purpose of the statutes is merely to make certain that the words, as such, contained in the document are those of the testator. The will itself is of no effect until the testator's death. Until then it is nothing but a mere substance which may be dealt with by cancellation or obliteration at the pleasure of the maker.

POWER OF THE SENATE TO AMEND A TREATY.—When the Senate amended the Hay-Pauncefote treaty before ratification, it was the object of some criticism on the ground that it had arrogated to itself a power foreign to its constitutional rights. A similar position is taken in a recent vigorous attack on its action in amending the arbitration treaties. *The Power of the Senate to Amend a Treaty*, by B. M. Thompson, 3 Mich. L. Rev. 427 (April, 1905). The treaty-making power is defined in Art. II. § 2, of the Constitution as follows: "He (the President) shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Mr. Thompson contends that the power given to the Senate by this provision, like that conferred upon it to concur in the appointment of federal officials, is one of veto purely, giving no right to amend. This position has been charac-

terized as absolutely untenable. See *THE TREATY-MAKING POWERS OF THE SENATE*, by H. C. Lodge, Scribners' Magazine, January, 1902. Senator Lodge cites in support of his own view sixty-eight treaties which have been amended by the Senate before ratification; and he points out that such action has not only been very common, but has even been expressly requested by several of the Presidents. The Senate's right to amend has also been affirmed in an unequivocal *dictum* by the Supreme Court, as well as by several eminent writers on constitutional law. See *Haver v. Yaker*, 9 Wall. (U. S.) 32, 35; 1 BRYCE, AM. COMMONWEALTH 104. In opposition to the view thus approved by usage and authority, Mr. Thompson is unable to cite a single precedent or opinion. Furthermore, his reasoning seems to be open to question in several instances. The analogy between the treaty-making power of the Senate and its power over the appointment of federal officials fails at the outset because of the important difference in the wording of the clauses in which the powers are respectively defined. See U. S. CONST. Art. II. § 2. In the clause relating to the appointment of officials, the phrase "and by and with the consent of the Senate, shall appoint" follows immediately after the word "nominate." Its position thus shows plainly that the Senate was not intended to have any right to select or propose names. The comparison between the veto power of the President over legislation of Congress with the power of the Senate over treaties seems, on the whole, in the light of the history and language of the respective clauses, rather fanciful. See Art. I. § 7. In the preliminary passages of his article, however, Mr. Thompson discusses in very interesting fashion the practical effect which the ratification of the treaties unamended would have had. His conclusion that the only additional right which would have been conferred on the President thereby, would be the authority to submit questions to arbitration which he might have settled by diplomatic adjustment, seems warranted, although it may be questioned whether this is so slight an increase in the power of the executive as Mr. Thompson apparently thinks.

AGREEMENTS OF THE UNITED STATES OTHER THAN TREATIES. *Charles Cheney Hyde*. An inquiry into what agreements the President may make without the cooperation of the Senate. 17 Green Bag 229.

ATTITUDE OF AMERICAN COURTS TOWARDS RESTRICTIVE LABOR LAWS. *Henry R. Seager*. 19 Pol. Sci. Quar. 589.

BASIS OF REASONABLE TIME, THE. *Frank E. Hodgins*. Holding that reasonable time must be determined principally from the point of view of the obligee. 41 Can. L. J. 305.

BURDEN OF PROOF IN CASES OF MARINE DISASTER, THE. *Frederic Cunningham*. Adversely criticising a decision in the Circuit Court of Appeals, which distinguishes non-statutory from statutory rules of navigation and puts burden of proof of "cause" on the injured vessel in case of breach of the former. 39 Am. L. Rev. 178.

CIVIL SERVICE CLASSIFICATIONS OF JURORS. *Joseph M. Sullivan*. Advocating a higher intellectual and moral qualification for jurors. 67 Alb. L. J. 77.

COMPÉTENCE EN MATIÈRE D'ACTION NAISSANT D'UN ABORDAGE, DE LA. *F. C. Autran*. An examination of the numerous rules for determining jurisdiction over actions arising from collisions at sea, embodying suggestions to the international maritime committee which is seeking uniformity. 32 J. du Droit Internat. Privé 44.

CONCURRENT POWER OF THE STATES TO REGULATE INTER-STATE AND FOREIGN COMMERCE. *David Walter Brown*. 5 Columbia L. Rev. 298.

CONDITIONS IN RESTRAINT OF MARRIAGE. *Anon.* Pointing out the distinction to be taken between realty and personalty as to such conditions. 40 Law J. 235.

CURR-STONE PATENT OPINIONS. *Dwight B. Cheever*. A popular question-and-answer discussion of elementary propositions in patent law. 3 Mich. L. Rev. 458.

DAMAGES FOR BREACH OF COVENANTS FOR TITLE. *Anon.* A discussion of two English cases, one of which gives plaintiff his costs in arbitrating with an incumbent but not the costs of an appeal. 49 Sol. J. 346.

- DOCTRINE OF *Lis Pendens* AS APPLIED IN INDIA, AND ITS APPLICATION TO SALES IN EXECUTION OF DECREES. III. Suits for Partition. *Abdul Karim Khan*. 2 Allahabad L. J. 57.
- DUE PROCESS OF LAW. *Isaac Franklin Russell*. An historical treatment pointing out that the provision of the Fourteenth Amendment does not control forms of procedure and practice. 14 Yale L. J. 322.
- ESTOPPEL, A MISAPPLICATION OF THE DOCTRINE OF. *Thaddeus D. Kenneson*. A review of New York cases holding a principal estopped from denying the authority of an agent, where such authority is dependent upon an extrinsic fact known only to agent. 5 Columbia L. Rev. 261.
- ÉTUDES SUR LES EFFETS INTERNATIONAUX DES JUGEMENTS. *Et. Martin*. Discussing the jurisdiction of the foreign court as a condition to giving effect to the foreign judgment. 32 J. du Droit Internat. Privé 59 (Nos. I.-II.).
- EXPANSION OF CONSTITUTIONAL POWERS BY INTERPRETATION. *Paul Fuller*. 5 Columbia L. Rev. 193.
- FEDERAL CONTROL OF CORPORATIONS. *Thomas Thacher*. Arguing that the purpose of legislation providing such control is unconstitutional. 14 Yale L. J. 301.
- FEDERAL CONTROL OF INSURANCE. *Edwin Maxey*. 39 Am. L. Rev. 182.
- FEDERAL ENFORCEMENT OF THE CRIMINAL LAW. *J. B. Mackenzie*. Expressing the opinion that the Dominion Government has no jurisdiction in criminal offenses. 41 Can. L. J. 276.
- GAMBLING AND BETTING IN FOREIGN LAW. *Anon.* Discussing the legal standing of gambling-houses, race-track betting, and lotteries on the continent. 118 Law T. 451.
- INJUNCTION AGAINST CUTTING TIMBER—METHOD OF PROCEDURE. *Robert C. Jackson*. 10 Va. L. Reg. 964.
- INSANITY AND THE LAW OF NEGLIGENCE. *Wm. B. Hornblower*. Maintaining that an insane person should not be liable for negligence whether of nonfeasance or of misfeasance. 5 Columbia L. Rev. 278.
- INTERFERENCE WITH BUSINESS AND COMMERCIAL RELATIONS BY THIRD PARTIES. *Wm. H. Warren*. A discussion along familiar lines of the legal questions involved in the boycott and similar practices. 60 Cent. L. J. 305.
- JUDGE QUARLES ON THE FEDERAL CONTROL OF CORPORATIONS. *Anon.* Advocating such control as a remedy for the present confusion of state laws and loss of remedies to creditors. 22 Chic. L. J. 53.
- JUDICIAL LEGISLATION IN NEW YORK. *Wilbur Larremore*. Pointing out the tendency of the Court of Appeals to repudiate the doctrine of *stare decisis*, and advocating codification. 14 Yale L. J. 312.
- LAW OF BANKING IN SOUTH AFRICA, THE. II. *George T. Morice*. 22 South African L. J. 46.
- LAWS OF DESCENT AND INHERITANCE, THE ANCIENT AND MODERN. A Comparison of the Code of Hammurabi (Babylon, 2250 B.C.) with the Present Law of Illinois. *Anon.* 13 Am. Law. 102.
- LES PRINCIPALES CLAUSES D'ASSURANCE CONTRE LES RISQUES DE GUERRE. *Émile Andouin*. A comment on some questions raised by the terms of the special war risk policies agreed upon by the marine insurance companies. 32 J. du Droit Internat. Privé 146 (Nos. I.-II.).
- LIABILITY OF WATER COMPANIES FOR FIRE LOSSES. *Edson R. Sunderland*. Discussing various cases in which the question has arisen. 3 Mich. L. Rev. 442.
- LIQUIDATION OF COMPANIES IN THE TRANSVAAL, THE. *Anon.* 22 South African L. J. 56.
- MARITIME LAW AND JURISDICTION IN AUSTRALIA. I. *F. L. Stow*. First of a series of articles summarizing the results of Australian legislation and of the provisions of the Australian Constitution in regard to maritime matters. 2 Commonwealth L. Rev. 110.
- MENTAL DISTURBANCES AND THE CONSEQUENCES THEREOF AS ELEMENTS OF DAMAGES. *Sumner Kenner*. A summary of the law on the subject. 60 Cent. L. J. 205.
- MUNICIPAL LIABILITY FOR INJURIES RESULTING FROM DEFECTIVE AND INADEQUATE SEWERAGE. *Glenda Burke Slaymaker*. 60 Cent. L. J. 224.
- ORIGIN OF PRIVATE CORPORATIONS, WITH EARLY INSTANCES OF CORPORATE CREATION, THE. *Theodore D. Gottlieb*. An historical discussion, giving early instances of corporations. 28 N. J. L. J. 100.
- PARTIAL REVOCATION OF A WILL BY OBLITERATION, THE. *Anon.* 9 L. Notes (N. Y.) 5. See *supra*.
- PERPETUATION OF THE OPEN MARKET, THE. *Bruce Wyman*. Reviewing the decisions and supporting the majority view that it is unfair competition for a com-

- mination to insist that there shall be no dealings with its rivals. 17 Green Bag 210.
- POSITION OF A SUB-MORTGAGEE, THE. *Tej Bahadur Sapru*. Discussing the Indian law on the subject. 2 Allahabad L. J. 73.
- POSSESSION, I. and II. *Mancus*. Discussing the elements of lawful possession as determined by revenue collectors in India. 7 Bombay L. Rep. 33, 57.
- POWER OF THE SENATE TO AMEND A TREATY, THE. *B. M. Thompson*. 3 Mich. L. Rev. 427. See *supra*.
- PRESENT PROBLEMS OF CONSTITUTIONAL LAW. *J. W. Burgess*. 19 Pol. Sci. Quar. 545.
- PUBLIC LAW AND PRIVATE LAW. *A. A. Mitchell*. 17 Jurid. Rev. 30.
- RÉEXTRADITION, DE LA. *P. Le Boucq*. Stating the law and treaties governing cases where a fugitive extradited by one country is sought by another. 32 J. du Droit Internat. Privé 21.
- REMOTENESS OF CONTINGENT REMAINDERS. I., II., III. *H. W. E.* Showing the present state of English law in the various classes of cases, and the effect of the Act of 1877. 49 Sol. J. 397.
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- TRANSFER OF INTERESTS IN ASSOCIATIONS, THE. II. *George Wharton Pepper*. Discussing a number of actual and supposed cases. 53 Am. L. Reg. 240.
- TRIAL BY JURY IN GERMANY. *Burt Estes Howard*. 19 Pol. Sci. Quar. 650.
- "VOLENTI NON FIT INJURIA." *N. G. L. Child*. An examination of the application of this maxim to the law of negligence. 17 Jurid. Rev. 43.
- WHEN MAY PROMISSORY NOTES, MORTGAGES, CONTRACTS, AND BONDS, WITHOUT INDORSEMENT OR ASSIGNMENT IN WRITING, BECOME THE SUBJECTS OF A GIFT CAUSA MORTIS? *Walter J. Lutz*. 60 Cent. L. J. 244.

II. BOOK REVIEWS.

A PRACTICAL TREATISE ON THE LAW OF RECEIVERS, as Applicable to Individuals, Partnerships, and Corporations, with Extended Consideration of Receivers of Railways and in Proceedings in Bankruptcy. By William A. Alderson. New York: Baker, Voorhis & Company. 1905. pp. lxxi, 956. 8vo.

This book, written by the editor of the 1897 edition of "Beach on Receivers," is the latest, and in some respects the most complete, work upon an increasingly important subject. It takes up step by step the proceedings incident to a receivership, beginning with the grounds for the appointment of a receiver and ending with his discharge, and treats the whole from a practical point of view. The citations cover a large number of cases, many of them very recent; and so far as possible, the point involved in each is stated separately in the text. This attempt to incorporate at length the holdings of many individual decisions, instead of grouping the cases under statements of general principles, seems to lead to the book's most serious defects. A text-book of law, if it is to be of the highest value to the profession, should contain an orderly exposition of the underlying principles of the subject under discussion in order that the reader may obtain with the least effort a grasp of the law as a whole and, in addition,

it should furnish a reasonably complete citation of the authorities which establish those principles. In these days of exhaustive digests the peculiar contribution of a text-book to the advancement of legal knowledge is found in its exposition of principles and criticism of decisions rather than in its collection of cases. Mr. Alderson has made a very satisfactory collection of cases. But instead of developing his own statement of the underlying principles, he has endeavored to describe them by combining and arranging the short points of the cases cited, for the most part without explanation, criticism, or dissent on his part as to the value of each decision. The result is that a reader not already familiar with the subject has difficulty at times in following the development of the thought or even the meaning of the writer. Thus in § 173 one reads: "A receiver appointed in one state does not take title to property in another. In a statutory proceeding by the attorney-general for the dissolution of a corporation, . . . it was held that the receiver became invested with the title to all the corporation's property, wherever situated, whether in or without the state: and this though the statute did not so provide." These two statements as they stand are in apparent conflict, and the necessary explanation, namely, that in the second case the receiver was not an ordinary receiver, but a statutory receiver, a sort of universal successor to the defunct corporation, is not supplied by the author. Again, in § 262, in treating of the liability of a succeeding receiver on contracts of his predecessor, the author states: ". . . contracts made by a preceding receiver impose no legal duty or obligation upon his successor, and damages cannot be recovered at law against the succeeding receiver for refusing to perform the contracts of his predecessor." Five lines further on he says: "As a general proposition it may be asserted that a succeeding receiver is bound by the contracts of his predecessor." Possibly he means is bound *in equity* in the sense that the court will order him to perform such contracts, but he does not say so nor imply it by the context.

Furthermore, the making of a separate statement in the text for each case cited in the footnotes, which is the prevailing practice in this work, necessarily leads to exasperating repetition. Examples are found in §§ 42, 48, and in § 169. It is not unjust to say that the book contains many such instances of unnecessary repetition and of apparently conflicting statements. In fairness to Mr. Alderson, however, we note that the present work is in fact a revision and enlargement of "Beach on Receivers," rather than a new treatise, even adopting for the most part the exact language and citations of Beach; and the faults to which attention has been called are largely those found in the earlier work, though they are aggravated by the attempt of the present author to graft a mass of new authorities upon the old without changing the structure of the whole.

Another prominent fault is the lack of original discussion of the authorities. Very infrequently does the author express any opinion whatever upon the state of the law. He does, however, heartily condemn the appointing of the so-called "friendly receiver," in which, we believe, he is doing good service to the administration of justice. The last chapter of the book, which contains in the author's own words a clear and convenient summary of the whole field of receivership proceedings, is in many respects the best. It is to be regretted that the same clear, original statement does not extend throughout the work. Still, this text-book, while it does not contain the final statement of the law of receivership, is a useful and full collection of authorities, intelligibly arranged and adequately indexed, and as such will doubtless prove of service to the profession.

H. LEB. S.

DUNLAP'S ELEMENTARY LAW. By M. E. Dunlap. Third Edition. Revised by T. F. Chaplin. St. Louis: The F. H. Thomas Law Book Co. 1905. pp. v, 600. 8vo.

There is grave doubt in the minds of the teaching fraternity of the legal profession as to whether any completely satisfactory book on elementary law, embodying the general principles, rules, and definitions of all its branches,

can be written. In Mr. Dunlap's work, however, the present edition of which is a book of six hundred pages, with an elaborate index, we find an attempt at this difficult goal. The volume includes an abridgment of Blackstone's Commentaries, of Chitty on Pleading, Greenleaf on Evidence, and Story on Equity Jurisprudence. In addition there are separate discussions in a brief and concise form of the following subjects: Code Pleading, Contracts, Commercial Paper, Sales, Agency, Partnership, Bailments, Corporations, Domestic Relations, Torts, and Administration. Real Property is treated in an abridgment of Blackstone's second volume, to which many notes bearing on the later development of the law have been added.

The work's chief claim to attention lies in its serviceability to students who are preparing to take bar examinations in the various states. Graduates of law schools generally, and especially those holding a degree from a school where the case system is in use, know how important it is to review the subjects upon which the examinations for admission to the bar are based; and they have learnt from personal experience how well-nigh impossible it is to find a book treating the various topics of the law in a small and yet comprehensive compass. This new edition of Dunlap's Elementary Law more nearly satisfies the demand for such a manual than any that has come to our attention. Its adaptation to the purpose so far as the number of subjects treated is concerned, may be judged from an inspection of the requirements for the practice of law made in most of the states. In Texas, for example, the candidate for admission to the bar is expected to manifest familiarity with the following subjects: first, the elements of common law, and more particularly volumes one, two, and three of Blackstone's Commentaries; second, real property; third, contracts, and, under this division, the elements of contracts, sales, bills and notes, carriers, partnerships, corporations and agency; fourth, torts; fifth, equity jurisprudence; sixth, pleading, practice, and evidence; seventh, domestic relations and administration of decedents' estates; eighth, constitutional and statutory law; and ninth, criminal law, particularly the fourth volume of Blackstone. Inasmuch as the questions asked in Texas range over as wide a field as those propounded in other jurisdictions, Mr. Dunlap's Abridgment seems to cover satisfactorily the scope of a bar examination. The substantive matter of the book is also of good quality: the abridgments of the standard works are made with care; and the original treatises on other branches of the law set forth clearly, concisely, and correctly the leading principles which it is important to have in mind.

GAI INSTITUTIONES, or Institutes of Roman Law by Gaius. With a Translation and Commentary by the late Edward Poste. Fourth Edition, revised and enlarged by E. A. Whittuck. With an historical introduction by A. H. J. Greenidge. Oxford: The Clarendon Press. 1904. pp. lv, 668. 8vo.

Anyone who uses the translation and commentary of the late Edward Poste on the Institutes of Roman Law by Gaius will agree that the words of the Vice-Chancellor of his University, *Omnium quos cognovi, doctissimus*, were deservedly applied. The present edition of the work, which is its fourth, is by E. A. Whittuck, who has revised the translation and commentary and made other changes. Chief among the differences between this and preceding editions is the abridgment of those portions of the commentary which had reference to analytic jurisprudence. This has been done for the purpose of rendering the commentary less difficult to students, and in the belief that the general theory of the law might better be studied in other treatises. In consequence, the Preliminary Definitions are omitted, and in their place has been inserted an Historical Introduction to Gaius, of some fifty pages, by Dr. Greenidge, an authority on Roman Constitutional history. In this introduction are considered the sources and development of Roman law, showing its gradual unification in succeeding epochs: first, the period in which the customs of the clans merged

into the customs of the state; second, that in which a uniform system for both patricians and plebeians was evolved; third, the unification of Rome with Italy, and last, continuing to the time of Gaius himself, that of imperial unification. The text used is that of Krueger and Studemund; and some conjectural readings are added in the appendix.

The text of Gaius and Mr. Poste's translation are set out in parallel columns, and the commentary is interpolated at the natural divisions of the subject-matter. The translation is done in clear, terse English, and the force of the Latin seems not to have been lost. The commentary, too, shows at the same time the learning of the author and his proficiency in the use of his mother tongue, for it is clear, readable, and interesting. A chronological table of events important in the development of Roman law is prefixed to the translation and commentary, and an excellent index to both text and commentary is supplied at the end.

THE NATIONAL ADMINISTRATION OF THE UNITED STATES OF AMERICA.

By John A. Fairlie. New York: The Macmillan Company. 1905. pp. xi, 274. 16mo.

In his preface to this volume the author expresses his surprise that "no comprehensive and systematic work on American national administration" has as yet been published, since, in his opinion, the problems of administration, as distinguished from the problems arising from the operation of the legislative and judicial branches of the government, are the "important problems of the present." One might possibly be led from this to infer that the main purpose of the volume was to contribute something in the way of original discussion to the administrative problems which are to-day vexing students, writers, and statesmen. Outside, however, of the first two chapters, on the President, little of this sort of thing is attempted. The book is, in short, simply a detailed exposition of the functions of the administrative officers of the United States and of the organization of the administrative departments. The first chapter on the President discusses the development of the President's power of appointment and removal, and of his ordinance power, particularly from the aspects in which those powers merge with and partake of the nature of the legislative and judicial functions. There are short chapters on the relation of Congress to the Administration, and on the constitution of the Cabinet. The remaining two-thirds of the volume are devoted to a detailed account of the organization of the Departments, prefaced in each case by a brief historical summary. The chapters are admirable in arrangement, and their information exhaustive; no departmental functionary is too humble to have escaped the author's notice. The book fills a distinct need, and should prove of much value for speedy reference.

THE HINDU WILLS ACT (Act XXI of 1870), with which is incorporated the Probate and Administration Act, with elaborate notes and commentaries.
By Mahendra Chandra Majumdar. Calcutta: Sanyal & Co. 1904. pp. lvi, 824. 8vo.

A codification of any branch of the law invariably creates a demand for a work of comment and annotation as an aid in interpreting and applying the bare skeleton of the statute. To satisfy such a demand is the aim of the present work. The book opens with a brief preliminary statement of the causes and conditions which led to the passage in 1870 of the Hindu Wills Act, extending to the native races of India rules and regulations similar to those which govern testamentary disposition in England. Then follows a commentary which takes up each section of the Act in order, compares it with the law in England, and illustrates its practical application by a review of the English and Indian cases.

The Act is, in its essence, composed of the law which is administered in the Courts of England. In fact, many parts of the English Wills Act of 1837 are copied literally. For example, the provision as to revocation by "burning, tearing, or otherwise destroying" is the same in both acts. On the other hand, there are some striking departures from the English law; such as the provision in regard to ademption which gives to a legatee a bequest notwithstanding a subsequent provision made for him by settlement or otherwise. In addition to the commentaries upon the Wills Act of 1870, the book contains a like treatment of the Probate and Administration Act of 1881. It thus comprises a complete exposition of the Hindu law relating to wills, and should be of considerable assistance to the Indian student and practitioner.

THE AMERICAN CONSTITUTIONAL SYSTEM. By Westel W. Willoughby. New York: The Century Co. 1904. pp. 318. 8vo.

This little book might well have been called "Some Questions in American Constitutional Law." It is chiefly concerned with the history and solution of the salient constitutional problems which have vexed our political thinkers. Some of these questions are already closed, some barely opening, all of them are interesting. Professor Willoughby's book does not give one any well-proportioned knowledge of the morphology and functioning of the American States' governmental organs; but it may well serve as a useful supplement to a more descriptive text-book. In fact, it is intended as the introduction to a series of volumes which are to deal with the "American State" in greater detail. The bulk of the book is a wealth of quotations from the United States Supreme Court reporter, which at times, when joined in lengthy succession, become more or less tedious. Still, since these are sources as well as expositions, they lend the book the peculiar interest of authoritativeness, and make it remarkably definite, considering its brevity and scope. The argument proceeds in a naturally logical sequence which makes it easy to follow and to understand. The author has, all in all, succeeded in making interesting his discussion of the older controversies, and in giving a clear and timely treatment to the problems of living interest.

WHARTON AND STILLÉ'S MEDICAL JURISPRUDENCE. Vol. I. Mental Unsoundness. Legal Questions by Frank H. Bowlby. Insanity: Forms and Medico-Legal Relations, by James Hendrie Lloyd. Vol. II. Poisons. By Robert Amory and Robert L. Emerson. Vol. III. Physical Conditions and Treatment. Medical Aspects by Truman Abbe; Legal Aspects by Frank H. Bowlby. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1905. pp. clv, 1031; xxx, 858; lxxix, 692. 8vo.

TABLE OF CASES alphabetically arranged as to the several states, in the American Decisions, American Reports, American State Reports, showing the cases to which notes are appended and the subject of such notes, also what cases in these series have been affirmed, reversed, or dismissed by the United States Supreme Court. By Wm. S. Torbert. Also List of Notes in the above. By A. C. Freeman. San Francisco: Bancroft & Whitney Company. 1905. pp. 754. 4to.

INDEX OF CASES judicially noticed (1865-1904), containing every case cited in judgments reported in the Law Reports from the commencement of this publication in 1865 to the end of 1904, as also a statement of the manner in which each case is dealt with in its place of citation. By A. N. Kant. London: William Clowes and Sons, Limited. 1905. pp. vi, 751. 8vo.

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- CURRENT LAW. A Complete Encyclopedia of New Law. Volume III. Abatement and Revival to Indians. Edited by George Foster Longdorf and Walter A. Shumaker. St. Paul, Minn.: Keefe-Davidson Company. 1905. pp. xv, 1710. 4to.
- A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW. By Francis Wharton. Third Edition by George H. Parmele. In two volumes. Rochester, N. Y.: The Lawyers' Co-operative Publishing Co. 1905. pp. ccxxiv, 1-848; xxvii, 849-1830. 8vo.
- THE CENTENARY OF THE FRENCH CIVIL CODE. By Sir Courtenay Ilbert. (From the Proceedings of the British Academy, Vol. I.) London: Published for the British Academy by Henry Froude, Oxford University Press Warehouse. pp. 16.
- A SELECTION OF CASES ILLUSTRATIVE OF THE ENGLISH LAW OF TORT. By Courtney Stanhope Kenny. Cambridge: At the University Press. 1904. pp. xiv, 632. 8vo.
- REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1903. Volume I. Washington: Government Printing Office. 1905. cvii, 1216. 8vo.

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